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3	Aug 24 1994	X	Brief of respondents Anchorage Equal Rights Commission, et al. in opposition filed.
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No. _____

In The

Supreme Court of the United States

October Term, 1994

TOM SWANNER, d/b/a WHITEHALL PROPERTIES,

Petitioner,

v.

ANCHORAGE EQUAL RIGHTS COMMISSION, PAUL L. CONNERTY, EXECUTIVE DIRECTOR, ex rel. JOSEPH BOWLES, WILLIAM F. HARPER, and DEE MOOSE,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of The State Of Alaska

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Alaska Supreme Court ruled that the Alaska and Anchorage anti-marital status discrimination laws mandate that Thomas Swanner, a devoted member of the Christian faith and a residential landlord, rent property to unmarried cohabitors in disregard of his sincere religious convictions that unmarried cohabitation is sinful, and that if he were to assist or facilitate cohabitation he would commit a sin himself. The Alaska Supreme Court's opinion conflicts in principle with the opinion of the Minnesota Supreme Court in *Minnesota v. French*, and the opinion of the Massachusetts Supreme Court in *Attorney General v. Desilets*, conflicts directly with the opinion of the California Court of Appeals in *Smith v. Commission of Fair Empl. & Hous.*, and conflicts in principle with this Court's opinions which are controlling under the Religious Freedom Restoration Act of 1993.

The questions presented are:

1. Does eliminating marital status discrimination constitute a compelling government interest thereby overriding Swanner's right to the free exercise of religion under the First Amendment and the Religious Freedom Restoration Act of 1993?

2. Should this Court reexamine and overrule its decision in *Employment Division v. Smith*, 494 U.S. 872 (1990)?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings below were:

Appellant (petitioner herein): Tom Swanner d/b/a Whitehall Properties.

Appellees (respondents herein): Anchorage Equal Rights Commission, Paul L. Connerty, Executive Director, ex rel. Joseph Bowles, William F. Harper, and Dee Moose.

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In The

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TOM SWANNER, d/b/a WHITEHALL PROPERTIES,

Petitioner,

v.

ANCHORAGE EQUAL RIGHTS COMMISSION, PAUL L. CONNERTY, EXECUTIVE DIRECTOR, ex rel. JOSEPH BOWLES, WILLIAM F. HARPER, and DEE MOOSE,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of The State Of Alaska

PETITION FOR WRIT OF CERTIORARI

Petitioner Tom Swanner d/b/a Whitehall Properties prays that the Court issue a writ of certiorari to the Supreme Court of the State of Alaska to review the opinion of that court in *Swanner v. Anchorage Equal Rights Comm'n.*

OPINIONS BELOW

The Alaska Supreme Court's opinion on rehearing is reported at 874 P.2d 274 (Alaska 1994). Appendix A (App. 1).

The original opinion of the Alaska Supreme Court, now withdrawn, was published at 868 P.2d 301 (Alaska 1994). Appendix B (App. 43). The unreported opinion of the Superior Court of the State of Alaska, Third Judicial District is reprinted at Appendix C (App. 83). The unreported final order and decision of the Anchorage Equal Rights Commission is reprinted at Appendix D (App. 90).

JURISDICTION

The Alaska Supreme Court filed its original opinion on February 11, 1994 (App. 43). The Alaska Court accepted a petition for rehearing as timely by order dated February 28, 1994. The Alaska Court filed an order granting rehearing and withdrawing its original opinion on May 13, 1994 (App. 1). The Alaska Court filed its opinion on rehearing May 13, 1994 (App. 1-2). This Court has jurisdiction to issue a writ of certiorari to the Alaska Supreme Court pursuant to 28 U.S.C. § 1257(a).

STATUTES INVOLVED

In reaching its decision below, the Alaska Supreme Court relied in part on the First and Fourteenth Amendments to the United States Constitution, the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb *et seq.*, the Alaska anti-marital status discrimination statute, AS 18.80.240, and the Anchorage anti-marital status discrimination ordinance, AMC 5.20.020. The pertinent texts are set forth in Appendix E (App. 115 to App. 117).

STATEMENT OF THE CASE

1. *Introduction.* This petition challenges the Alaska Supreme Court's subordination of the Free Exercise Clause of the First Amendment to local government interests to deter private marital status discrimination. Equating the Constitutional importance of the local governments' interest to deter marital status discrimination with the interest to eradicate discrimination against certain historically disadvantaged groups, such as discrimination based upon race and gender, the Alaska Court ruled that a compelling government interest exists to justify overriding Swanner's free exercise rights under the First Amendment and the Religious Freedom Restoration Act of 1993.

Specifically, the Alaska Court ruled that the Alaska and Anchorage anti-marital status discrimination laws mandate that Swanner, a devoted member of the Christian faith and a residential landlord, rent property to unmarried cohabitors in disregard of his sincere religious convictions. As a Christian, Swanner believes that unmarried cohabitation is sinful and that if he were to assist or facilitate cohabitation he would commit a sin himself. Classifying Swanner's religiously based conduct as an "independent social evil" (App. 20), the Alaska Court decided that the governments' broadly defined interest to deter discrimination in all forms, based upon "irrelevant characteristics," is compelling. The Alaska Court then wielded this broadly defined interest to elevate the narrow interest at issue, deterring private discrimination in housing against unmarried cohabitors, to a compelling level even though (1) the State of Alaska itself discriminates against unmarried couples in significant respects,

and (2) the eradication of marital status discrimination has never been treated as a compelling interest under federal law. (App. 36-38).

The Alaska Court's decision, which conflicts in principle with the decision of the Minnesota Supreme Court in *Minnesota v. French*, 460 N.W.2d 2 (Minn. 1990) and the decision of the Massachusetts Supreme Court in *Attorney General v. Desilets*, ___ N.E.2d ___, 1994 Mass. LEXIS 396 (Mass., July 14, 1994), conflicts directly with the decision of the California Court of Appeals in *Smith v. Commission of Fair Empl. & Hous.*, 25 Cal. App. 4th 251, 30 Cal. Rptr. 2d 395, *mod. reh'g den.* 1994 Cal. App. LEXIS 649 (Cal. App., June 23, 1994), and conflicts in principle with this Court's opinions in *Sherbert v. Verner*, 374 U.S. 398 (1963); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985); and *United States v. Lee*, 455 U.S. 252 (1982), impermissibly presents Swanner with a Hobson's choice to either sacrifice his religious convictions or give up his economic livelihood.

2. *Facts.* Thomas Swanner is a devoted member of the Christian faith. He has served the Christian church, the Wesleyan and Grace Brethren denominations, as a full time and part time pastor and marriage counselor for more than twenty-eight years. Swanner has also served as an elder[1] in the churches he has attended for over

[1] An "Elder" in the Christian church is a man who oversees the affairs of the church. Tr. 157. The Bible delineates the qualifications which an Elder must satisfy. Tr. 159-160 *quoting* I Timothy 3:1-7; Titus 1:5-9. Citations to "Tr." are to the reporter's transcript of the evidentiary hearing before the Anchorage Equal Rights Commission.

twenty-eight years. As a Christian, Swanner's religious beliefs are founded upon the Bible, which he believes to be the absolute, true, and infallible word of God. (Tr. 165).

Swanner has two religious beliefs that are central to this case. First, Swanner believes that cohabitation[2] between unmarried couples constitutes the sin of fornication and is grievously offensive to God. Second, Swanner believes that if he were to assist or facilitate someone else's cohabitation, he would commit a sin himself and would disqualify himself from serving as an elder in the Christian church. (Tr. 168-170, 176-78). Swanner's religious beliefs regarding cohabitation are rooted in a widely held tradition within Christianity which extends back to the Old Testament,[3] and includes the New Testament,[4] the teachings of the Lord Jesus Christ,[5] the teachings of the Apostle Paul,[6] the teaching of the Apostle Peter,[7] and the theology of the Reformation leader John Calvin.[8] (Tr. 162-170, 174-180). The nature and sincerity of

[2] To "Cohabit" means "to live together in a sexual relationship when not legally married." *The American Heritage Dictionary* 259 (1980).

[3] Exodus 22:16; Leviticus 19:20; Deuteronomy 22:13-21, 23:17; Proverbs 2:16, 5:3-6, 6:24-29, 7, 29:3; Ecclesiastes 7:26; Hosea 4:11.

[4] Acts 15:19-20; Jude 7; Revelation 2:14, 21:18, 22:15.

[5] Matthew 15:16-20; Mark 7:18-23.

[6] Romans 1:29; I Corinthians 5:9-11, 6:9; II Corinthians 12:21; Galatians 5:19-21; Ephesians 5:5; Colossians 3:5-6; I Thessalonians 4:3; I Timothy 1:8-11; Hebrews 13:4.

[7] I Peter 4:1-6.

[8] John Calvin, *Calvin's Commentaries: The Epistle of Paul to the Romans and to the Thessalonians* (Ross MacKenzie trans.).

Swanner's religious beliefs, and the fact that his conduct at issue is religiously based, were not disputed by the Alaska Supreme Court or the respondents (App. 5, 17, 87).

Swanner is also the sole owner of a modest business, Whitehall Properties ("Whitehall"), which manages residential rental properties in Anchorage, Alaska. Whitehall is significantly impacted by Swanner's Christian faith because he sincerely believes that his faith is to be lived out in every aspect of his life. Swanner commits himself to practice his Christian beliefs in all aspects of his life, including his commercial activities as a landlord. (Tr. 264-65). Whitehall operates without regard to race, religion, gender, and marital-status. (R. 277).[9] However, based solely upon his Christian beliefs, Swanner will not rent Whitehall property to unmarried couples who intend to cohabit. (App. 10).

Joseph Bowles ("Bowles"), William F. Harper ("Harper"), and Dee Moose ("Moose") (collectively "respondents") each inquired of Swanner about renting housing. Upon learning of respondents' unmarried status and their intentions to cohabit,[10] Swanner declined to rent to each

[9] Whitehall rents property to persons of all races, persons of all religions, persons of both genders, single persons, men and women married to one another, separated or widowed persons, and single parents or grandparents. (R. 277). Citations to "R" are to the record before the Alaska Supreme Court.

[10] Respondents were each unmarried at the time they sought to rent housing from Swanner. Respondents each intended to cohabit any property which they rented from Swanner with a member of the opposite sex to whom they were not married. (App. 4-5, 9-10 n.4).

of them. It is undisputed that Swanner declined to rent to respondents because of his Christian beliefs regarding cohabitation and for no other reason (App. 5). Respondents were not significantly impacted in their rental housing searches because Swanner remained true to his religious convictions. (R. 160, 206, 213, 241, 243, 331).

3. *The Federal Questions Were Timely And Properly Raised.* Respondents each filed complaints of marital status discrimination against Swanner with the Anchorage Equal Rights Commission ("AERC") alleging violations of state and municipal laws. AS 18.80.240 and AMC 5.20.020. (App. 4). Swanner argued to the AERC that he is entitled to an exemption from the anti-marital status discrimination laws based upon his right to the free exercise of religion under the First and Fourteenth Amendments to the United States Constitution. (App. 101-102). AERC rejected Swanner's free exercise arguments. Appendix D.[11] The Alaska Superior Court affirmed. Appendix C. Swanner appealed to the Alaska Supreme Court. Appendix B. Applying this Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), the Alaska Supreme Court originally determined that enforcement of the anti-marital status discrimination laws against Swanner does not violate his First Amendment rights because the laws are generally applicable and neutral toward religion. (App. 50-54 and 55 n.9).

[11] AERC ordered Swanner to cease refusing to rent to unmarried cohabitors. AERC also ordered Swanner to post and distribute to existing and potential tennants public notices declaring that his policy regarding cohabitation is illegal. (App. 112-13).

After briefing and oral argument in the Alaska Supreme Court, on November 16, 1993 President Clinton signed into law the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb *et seq.* (hereafter "RFRA"). RFRA, which is expressly retroactive,[12] moots *Smith* by creating a federal statutory protection for the free exercise of religion codifying the compelling interest test set forth in *Sherbert* and *Yoder* (App. 14, n.9).[13] The Alaska Supreme Court did not apply RFRA in its original decision. (App. 55 n.9).

Swanner petitioned for rehearing arguing that application of *Smith* was improper because of the expressly retroactive effect of RFRA. The Alaska Court accepted Swanner's petition, asked respondents to reply, granted rehearing, withdrew the original opinion, and issued a new decision. (App. 1-2). On rehearing, the Alaska Court again rejected Swanner's First Amendment free exercise arguments under a *Smith* analysis and simply acknowledged the "assumed" constitutionality and applicability of RFRA in a footnote (App. 1-2, 10-14 and n.9). Although acknowledging conflicting state court decisions in Minnesota and California (App. 55-56 n.10), and although purporting to apply this Court's pre-*Smith* precedents, the Alaska Court ruled that RFRA did not alter its prior conclusion.

The Alaska Court rejected Swanner's RFRA arguments by equating its own unique adaptation of *Sherbert* and *Yoder* with the compelling interest test codified in

[12] 42 U.S.C. § 2000bb-3(a).

[13] 42 U.S.C. §§ 2000bb(a); 2000bb-1(a); 2000bb-1(b).

RFRA. In reaching its decision, the Alaska Court created a never before recognized differentiation between what it termed "derivative" and "transactional" government interests. (App. 18-21, 29-30). The Alaska Court lumped all forms of discrimination together in terms of Constitutional significance and created a "catch-all" classification for "discrimination based upon irrelevant characteristics." The Alaska Court determined that there is a compelling government interest to eradicate all forms of discrimination in all circumstances. The Alaska Court ruled that government need not present evidentiary support to substantiate harm to its claimed compelling interest. The Alaska Court ruled that free exercise rights are afforded lesser protection when they are exercised in a commercial setting. (App. 22-23). Finally, the Alaska Court ruled that the anti-marital status discrimination laws are narrowly tailored and that there are no less restrictive alternatives to overriding Swanner's religious beliefs (App. 14 n.9).[14]

[14] Chief Justice Daniel Moore filed a dissenting opinion arguing that Alaska has no compelling interest to protect unmarried cohabitors from private discrimination in housing to outweigh Swanner's free exercise of religion. Chief Justice Moore found that (a) the previously unrecognized differentiation between "derivative" and "transactional" interests is amorphous and unworkable (App. 29-30), (b) the recognition of a classification of discrimination "based upon irrelevant characteristics" is unworkable and inconsistent with prior case law (App. 30-34 and n.2), (c) the governments' interest to eradicate

REASONS FOR GRANTING THE WRIT

The Alaska Supreme Court's decision that local governments may compel a residential landlord to rent property to unmarried cohabitors despite the landlord's sincere religious convictions that cohabitation and its facilitation are sinful conflicts directly and in principle with all other state court decisions on the issue. Sup. Ct. R. 10.1(b). This Court should grant the petition and review the decision of the Alaska Supreme Court in order to correct the abberation.

This case presents important questions of federal Constitutional and statutory law which have not been, but should be, settled by this Court. Sup. Ct. R. 10.1(c). This Court has not yet, but should, address the meaning and effect of RFRA. Because RFRA moots *Smith*, this Court should clarify the protection afforded federal free exercise rights by its pre-*Smith* precedents which are now, once again, controlling. This Court also has not yet, but should, address the entitlement of a residential landlord to a federal free exercise exemption from laws prohibiting marital status discrimination. The latter question, and the

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marital status discrimination in housing is not compelling and is not equivalent to the governments' interest to eradicate discrimination based upon race and gender (App. 34-36 and n.4), (d) the relative insignificance of marital status discrimination is demonstrated by the fact that the State of Alaska itself discriminates against unmarried couples in significant respects (App. 35-36), (e) marital status classifications have never been accorded heightened protection under federal law (App. 36-38), and (f) affording free exercise rights lesser protection when they are exercised in a commercial setting conflicts with this Court's decision in *United States v. Lee* (App. 38-39).

effect of RFRA on the answer to that question, presents a recurring problem which should be resolved by this Court.

The Alaska Court's rejection of Swanner's free exercise arguments is in error and its meager protection of federal free exercise rights conflicts with this Court's opinions which are controlling under RFRA. Sup. Ct. R. 10.1(c). This Court should grant the petition and review the Alaska Supreme Court's decision in order to correct the error.

This Court's decision in *Smith* is ripe for reexamination. Since its pronouncement the *Smith* rule has been severely criticized. These criticisms have resounded from justices of this Court, legal scholars, and the United States Congress. In addition to generating criticism, *Smith* is the genesis of a body of divergent and conflicting law regarding the protection of free exercise rights. Lower federal courts have applied the *Smith* rule with a vengeance to deny religious adherents Constitutional protection in a wide array of circumstances. In response, some state appellate courts have interpreted their own state constitutions to provide a safe haven for free exercise of religion. The result is a hodge podge of conflicting, rather than uniform, levels of protection for a fundamental Constitutional right. Reexamination of *Smith* poses an important question of federal law which should be addressed by this Court. Sup. Ct. R. 10.1(c).

I. THE ALASKA SUPREME COURT'S DECISION IN *SWANNER* CONFLICTS DIRECTLY AND IN PRINCIPLE WITH THE DECISIONS OF COURTS FROM OTHER STATES

Unlike the Alaska Supreme Court, the Minnesota Supreme Court has ruled that government does not have a compelling interest to eradicate private discrimination against unmarried cohabitors and has granted a free exercise exemption to residential landlords from anti-marital status discrimination laws. *Minnesota v. French*, 460 N.W.2d 2 (Minn. 1990). The Minnesota Court's decision in *French* conflicts in principle with the Alaska Supreme Court's decision in *Swanner.*

The facts presented to the Minnesota Court in *French* were nearly identical to those presented to the Alaska Court in *Swanner. Id.* at 3-4. On these near identical facts, the Minnesota Court determined that the state has no compelling interest to eradicate discrimination against unmarried cohabitors. *Id.* at 10. Moreover, while the Alaska Court styled Swanner's religiously based conduct as an "independent social evil" (App. 20-21), the Minnesota Court concluded that French's religious convictions reflect moral values which form the foundation for our nation's fundamental institutions. *Id.* at 11. Confirming the conflict in principle, the Alaska Court cited *French* and rejected the Minnesota Court's reasoning (App. 15-16 n.10).

The Massachusetts Supreme Court recently filed a decision on this exact issue which, like *French*, conflicts in principle with the Alaska Supreme Court's decision in *Swanner. See Attorney General v. Desilets*, ___ N.E.2d ___, 1994 Mass. LEXIS 396 (Mass., July 14, 1994). The facts

presented to the Massachusetts Court in *Desilets* were nearly identical to the facts presented to the Alaska Court in *Swanner.* On these near identical facts, the Massachusetts Court determined that the state has no *per se* compelling interest to eradicate discrimination based upon marital status or against unmarried cohabitors. The Massachusetts Court ruled that the government cannot override a free exercise right by asserting the broadly defined interest to eliminate discrimination in all forms. The Massachusetts Court required the state to argue the narrowly defined issue of whether eradicating discrimination in housing against unmarried cohabitors constitutes a compelling government interest. The Massachusetts Court refused to equate the Constitutional significance of marital status discrimination with that of discrimination based upon race or gender. Moreover, the Massachusetts Court ruled that religioius liberty does not receive diminished protection in a commercial setting and required the state to present evidence to substantiate the claimed harm to its alleged compelling interest. Confirming the conflict in principle, the Massachusetts Court cited *Swanner* and declined to adopt its reasoning.

Two California Courts of Appeal have reached the same conclusion as the Minnesota and Massachusetts Supreme Courts. *See Donahue v. Fair Emp. and Hous. Comm'n*, 13 Cal. App. 4th 350, 2 Cal. Rptr. 2d 32 (1991), *superseded*, 5 Cal. Rptr. 2d 781, 825 P.2d 766 (Cal. 1992), *remanded, Donahue v. Fair Employment & Hous. Comm'n*, 23 Cal. Rptr. 2d 591, 859 P.2d 671 (Cal. 1993); *Smith v. Commission of Fair Empl. & Hous.*, 25 Cal. App. 4th 251, 30 Cal. Rptr. 2d 395, *mod. reh'g den.* 1994 Cal. App. LEXIS 649 (Cal. App., June 23, 1994). The California Court's decision

in *Smith v. Comm'n* conflicts directly with the Alaska Supreme Court's decision in *Swanner*.

The facts presented to the California Court in *Smith v. Comm'n* were also nearly identical to the facts presented to the Alaska Supreme Court in *Swanner*. 30 Cal. Rptr. 2d at 397. On these near identical facts, the California Court ruled that the government cannot override a free exercise right by asserting a broadly defined interest to eliminate discrimination in general. The California Court required the state to argue the narrowly defined issue of whether eradicating discrimination in housing against unmarried cohabitors constitutes a compelling interest. The California Court refused to equate the Constitutional significance of marital status discrimination with that of discrimination based upon race. *Id.* at 404-06. The California Court concluded that the interest to eradicate discrimination against unmarried cohabitors is not compelling and cannot override the First Amendment right to free exercise of religion. *Id.* at 406. Confirming the direct conflict, the California Court cited and rejected *Swanner*, stating that it agrees with the dissent of Alaska Supreme Court Chief Justice Daniel Moore. 1994 Cal. App. LEXIS 649.

II. THE ALASKA SUPREME COURT'S DECISION IN *SWANNER* AFFECTS IMPORTANT AND RECURRING QUESTIONS OF FEDERAL CONSTITUTIONAL AND STATUTORY LAW

Congress enacted the Religious Freedom Restoration Act of 1993 (42 U.S.C. §§ 2000bb *et seq.*, Pub. Law 103-141 [H.R. 1308], effective November 16, 1993) ("RFRA") to restore the level of protection for religious freedom that

existed prior to this Court's decision in *Employment Division v. Smith*. RFRA, which applies retroactively (*supra* n.12), was intended to "restore the compelling interest test previously applicable to free exercise cases by requiring that government actions that substantially burden the exercise of religion be demonstrated to be the least restrictive means of furthering a compelling government interest." Senate Report (Jud. Comm.) No. 103-111 *reprinted in* 1993 U.S. Code, Cong. & Ad. News 1892, 1898; 42 U.S.C. § 2000bb. RFRA provides that government shall not substantially burden a person's exercise of religion,[15] even if the burden results from a neutral rule of general applicability, unless it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest and (2) is the least restrictive means of furthering that interest. 42 U.S.C. § 2000bb-1(a), (b). This Court has not yet, but should, address the meaning and effect of RFRA. It is important for the Court to clarify the level of protection afforded federal free exercise rights by this Court's pre-*Smith* decisions which are now, once again, controlling under RFRA.[16] Sup. Ct. R. 10.1(c).

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[15] "Exercise of religion" means the exercise of religion under the First Amendment of the Constitution. *See* 42 U.S.C. § 2000bb-2(4).

[16] Courts are to "look to free exercise cases decided prior to *Smith* for guidance in determining whether the exercise of religion has been substantially burdened and the least restrictive means have been employed in furthering a compelling governmental interest." Senate Report (Jud. Comm.) No. 103-111 *reprinted in* 1993 U.S. Code, Cong. & Ad. News at 1898.

This Court has not yet, but should, consider whether a residential landlord is entitled to a free exercise exemption from state laws requiring rental to unmarried couples. This question, and the effect of RFRA on the answer to the question, is, and will continue to be, a recurring problem for state courts. In addition to the Alaska, Minnesota, Massachusetts and California decisions referenced above, there is presently one additional case on the identical free exercise issue pending in Illinois.[17] Further, this exact issue will inevitably arise in those additional jurisdictions which prohibit discrimination against unmarried cohabitors. In addition to Alaska, California, Massachusetts, and Illinois, jurisdictions which prohibit discrimination against unmarried couples include the District of Columbia (*Markham v. Colonial Mortg. Serv. Co.*, 605 F.2d 566, 569-70 (D.C. Cir. 1979)); New Jersey (*Zahorian v. Russell Fitt Real Estate Agency*, 62 N.J. 399, 301 A.2d 754, 757 (1973)); and Washington (*Loveland v. Leslie*, 21 Wash. App. 195, 613 P.2d 146, 148 (1978)).[18]

III. THE ALASKA SUPREME COURT'S DECISION IN *SWANNER* CONFLICTS IN PRINCIPLE WITH THIS COURT'S DECISIONS WHICH ARE CONTROLLING UNDER RFRA

Under RFRA respondents were required to show that Swanner's religiously based conduct constitutes a grave

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[17] *Jasniowski et al. v. Rushing et al.*, No. 94CH05546, which involves facts nearly identical to *Swanner*, is presently pending in the Circuit Court for Cook County, Illinois.

[18] Washington's Court is split on the issue. *See McFadden v. The Elma Country Club*, 26 Wash. App. 195, 615 P.2d 146 (1980).

and immediate danger to government or to a compelling interest the government seeks to promote. 42 U.S.C. § 2000bb-1; *accord West Virginia State Bd. of Ed. v. Barnette*, 319 U.S. 624, 639 (1943) ("They are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect"). "It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, '[o]nly the *gravest abuses, engendering paramount interests*, give rise for permissible limitation' " upon a person's right to the free exercise of religion. *Sherbert*, 374 U.S. at 406 (emphasis in original). "[O]nly those interests of the highest order and those not otherwise served, can overbalance legitimate claims to the free exercise of religion." *Yoder*, 406 U.S. at 215.[19]

A compelling government interest must be narrowly drawn. This principle is demonstrated by the Court's decision in *Yoder* where the State of Wisconsin was not allowed to justify its effort to force Amish children to attend school beyond the 8th grade by claiming a generalized interest to ensure that children are educated. This Court required Wisconsin to show a compelling justification for the narrowly drawn interest of ensuring that children receive an education beyond the 8th grade. *Id.* at 221. Because Wisconsin could not demonstrate a compelling justification for that narrowly drawn interest, the

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[19] *Accord Bowen v. Roy*, 476 U.S. 693, 728 (1986); *Thomas v. Review Board*, 450 U.S. 707, 718 (1981) ("The State may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling State interest").

Amish were exempt from the legal requirement. *Yoder*, 406 U.S. at 215-225.[20]

The State of Alaska, like the State of Wisconsin in *Yoder*, cannot justify its burden on free exercise of religion by claiming a broadly defined government interest. Alaska can justify burdening Swanner's free exercise rights only by demonstrating a narrowly defined compelling interest. Alaska's narrowly defined interest in this case is simply to deter discrimination in housing against unmarried cohabitors. Contrary to the Alaska Court's decision, this narrowly defined interest is far from compelling and cannot justify burdening Swanner's fundamental free exercise rights.[21]

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[20] Similarly, in *Thomas* the State of Indiana was not allowed to sustain its burden on free exercise by asserting the broadly defined interests to avoid widespread unemployment, the consequent burden on the state's unemployment fund, and detailed probing of individual religious beliefs. 450 U.S. at 718-19. Despite finding these broadly defined interests to be "by no means unimportant," the Court narrowed the inquiry and found Indiana's specific interests to be uncompelling. *Id.* at 719.

[21] The Alaska Court's differentiation between "derivative" and "transactional" government interests finds no support in this Court's precedents. This Court's precedents require the government's interest to be narrowly defined and compelling in order to justify overriding religious liberty. Far from narrowly defining the government interest used to justify burdening Swanner's free exercise (*e.g.*, deterring private discrimination in housing against unmarried cohabitors), the Alaska Court painted the government "transactional" interest in the broadest possible terms: eliminating discrimination in all forms in all circumstances. (App. 18-20).

The Alaska Court's decision that all forms of discrimination are Constitutionally equivalent, specifically equating marital status discrimination with discrimination based upon race and gender, ignores this Court's decision in *City of Cleburne v. Cleburne Living Ctr.* and misapplies *Yoder*. This Court has specifically stated that the various forms of discrimination (race, alienage, national origin, religion, gender, mental handicap, age) are not co-equal in Constitutional significance. Forms of discrimination vary in Constitutional significance and receive different levels of judicial scrutiny. *Cleburne*, 473 U.S. at 440-41.[22]

Contrary to the Alaska Court's reasoning, there is not a compelling government interest to eradicate discrimination against unmarried cohabitors just because there is a

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[22] Laws drawing distinctions based upon the suspect classifications of race, alienage, and national origin are subjected to strict scrutiny and are sustained only if they are suitably tailored to serve a compelling state interest. *Cleburne*, 473 U.S. at 440; *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964); *Graham v. Richardson*, 403 U.S. 184, 192 (1964). Distinctions based upon gender receive a slightly lower, yet heightened standard of review. "A gender classification fails unless it is substantially related to a sufficiently important governmental interest." *Cleburne*, 473 U.S. at 440-41, *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150 (1980); *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724 (1982); *Craig v. Boren*, 429 U.S. 190, 197 (1976). Distinctions based upon illegitimacy are subject to somewhat heightened review. "Those restrictions 'will survive equal protection scrutiny to the extent they are substantially related to a legitimate state interest.' " *Cleburne*, 473 U.S. at 441 *quoting Mills v. Habluetzel*, 456 U.S. 91, 99 (1982). Distinctions based upon age and mental handicap are subject to only rational basis review. *Cleburne*, 473 U.S. at 441, 446; *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 313 (1976).

compelling government interest to eradicate discrimination based upon race and gender. *See, e.g., Cleburne,* 473 U.S. at 440-41; *accord Bob Jones Univ. v. United States,* 461 U.S. 574, 592-95, 603-05 (1983); *Roberts v. United States Jaycees,* 468 U.S. 609 (1984). In *Bob Jones* the Court ruled that "the Government has a fundamental overriding interest in eradicating racial discrimination in education" because of the strong public policy against racial discrimination. The Court found the strong public policy against racial discrimination to be evidenced by a quarter of a century of pronouncements by this Court, myriad acts of Congress, and multiple Executive Orders. 461 U.S. at 592-95. In *Roberts* this Court ruled that there is a compelling government interest in eradicating gender discrimination because of the strong public policy toward "[a]ssuring women equal access to . . . goods, privileges, and advantages." The Court found this strong public policy to be evidenced by its past precedents. 468 U.S. at 625-26.[23]

Unlike classifications based upon race and gender, there is no strong historically recognized public policy against classifications based upon marital status (specifically, classifications based upon cohabitation). Rather,

[23] *See also* Duncan, *Who Wants to Stop the Church: Homosexual Rights Legislation, Public Policy, and Religious Freedom,* 69 N. Dame L. Rev. 393, 404-05, 434-36 (1994) (suggesting that the interests in eradicating race and gender discrimination are compelling because race and gender are "morally neutral," "benign," "non-behavioral" and tell nothing about a person's character, abilities or moral attributes and because race and gender classifications are based upon invidious and archaic assumptions).

there is a historical and institutionalized favor for the marriage relationship over cohabitation. For example, while this Court has recognized a fundamental right to marry (*Loving v. Virginia,* 388 U.S. 1 (1967)), it has never found "marital status" classifications to be Constitutionally improper, nor has it ever equated "marital status" classifications with recognized suspect classifications.[24]

Further, the Alaska Court's conclusion that there is a compelling interest to deter discrimination against unmarried cohabitors strains credulity because federal and Alaska law both contain preferences for marriage over cohabitation: (a) preferential tax treatment is given to married couples over unmarried couples,[25] (b) social security benefits are provided to married spouses but not to unmarried companions (*see* 42 U.S.C. § 416), (c) intestate succession laws protect married spouses but not unmarried companions (AS 13.11.015), (d) worker's compensation death benefits are provided only for a surviving spouse and not for a surviving companion (*see* 33 U.S.C. § 909; AS 23.30.215), (e) wrongful death statutes provide rights of action for the death of a married spouse

[24] Also, unlike race and gender, unmarried cohabitation is behavioral rather than immutable, and in the views of the world's major religions (Islam, Catholicism, and Christianity) is not morally neutral and does communicate something about a person's character and moral attributes. *See, e.g.,* Duncan, 69 N. Dame L. Rev. at 398-99, 401-05, 434-36.

[25] *See* 26 U.S.C. §§ 2056 (estate tax marital deduction); 2513 (spousal split-gift provisions); 2523 (gift tax marital deduction); 6013 (spousal split-income provision).

but not for the death of an unmarried companion,[26] (f) there is a privilege for communications between married spouses but not for communications between unmarried couples (Ak. R. Evid. 505), and (g) an unmarried companion has no right to alimony or property division when cohabitation terminates.[27] Further, neither the Federal Fair Housing Act, 42 U.S.C. § 3604 (1988) nor the Federal Civil Rights Act, 42 U.S.C. §§ 1981, 1982 (1988) prohibit discrimination based upon cohabitation, unless it is being used as a pretext for a more egregious form of discrimination (*i.e.*, race or gender).[28]

The Alaska Court's conclusion that government need not present evidentiary support to substantiate a "transactional" interest conflicts with this Court's decision in *Thomas*, 450 U.S. at 719 (rejecting the State's asserted reasons for refusing a religious exemption due to lack of evidence in the record). The Alaska Court's error in this respect appears to have been determinative. The record in

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[26] *See* AS 09.55.580; *Hibpsham v. Prudhoe Bay Supply, Inc.*, 734 P.2d 991 (Alaska 1987); *Gillispie v. Beta Const. Co.*, 842 P.2d 1272 (Alaska 1992).

[27] *See Sugg v. Morris*, 392 P.2d 313, 316 (Alaska 1964); *Hager v. Hager*, 553 P.2d 919, 922 (Alaska 1976); *Hill v. Ames*, 606 P.2d 388, 390 n.6 (Alaska 1980) (declining to reexamine *Sugg* and *Hager* in that case).

[28] *See Thomas v. Metroflight, Inc.*, 814 F.2d 1506 (10th Cir. 1987) (employer's no spouse rule violated Title VII only because its operation had a disparate impact on female employees); *accord EEOC v. Delta Airlines, Inc.*, 578 F.2d 115 (5th Cir. 1978); *Yuhas v. Libbey-Owens-Ford*, 562 F.2d 496 (7th Cir. 1977); *Stroud v. Delta Airlines, Inc.*, 544 F.2d 892, *reh'g denied* 548 F.2d 356 (5th Cir.), *cert. denied*, 434 U.S. 844 (1977); *Marable v. H. Walker & Assocs.*, 644 F.2d 390, 397 (5th Cir. 1981).

this case "is completely devoid of evidence to suggest that there are so many landlords or property managers in Anchorage whose religious beliefs are identical to Swanners as to constitute a substantial threat to available housing." (App. 41). For this reason also, the Alaska Court's conclusion that there are no less restrictive alternatives to overriding Swanners religious beliefs (App. 14 n.9) is error. Since there is no evidence in the record that landlords who hold religious convictions like Swanner's are numerous enough to deprive unmarried cohabitors of suitable housing, the only permissible conclusion for the Alaska Court was that accommodating these landlords' religious convictions will not cause the government's interest to suffer. *Thomas*, 450 U.S. at 719.

The Alaska Court's decision that free exercise rights are afforded lesser protection when they are exercised in a commercial setting conflicts with RFRA's express provisions and this Court's decision in *United States v. Lee*. RFRA makes no distinction regarding the context in which religious liberty is burdened and mandates application of the compelling interest test in all circumstances. 42 U.S.C. § 2000bb-1. *Lee* recognized that, even in a commercial setting, the state must justify its limitation on religious liberty by showing that the limitation is essential to accomplish a compelling government interest. *Lee*, 455 U.S. at 257-58.[29] Suggesting that there

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[29] *See also Thomas*, 450 U.S. 707 (the fact that a religious individual asserted his free exercise rights in the commercial setting of his employment did not alter or diminish the Constitutional protection for his rights); *Sherbert*, 374 U.S. at 406 (employment); *Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136, 137 (1987) (employment); *Frazee v. Illinois Dept. of Empl. Sec.*, 489 U.S. 829, 830-36 (1989) (employment).

is no substantial burden on Swanner's religious liberty simply because he can choose to sacrifice his economic livelihood and get out of the rental business is akin to impermissibly telling Jehovah's Witnesses that although they cannot use the city parks, they can go hold religious services somewhere else. *See, e.g., Fowler v. Rhode Island*, 345 U.S. 67 (1953). It is unreasonably burdensome, and coerces religious infidelity, for Alaska to force Swanner to choose between remaining true to his religious convictions or withdrawing from the housing market thus losing his ability to earn a livelihood. *Sherbert*, 374 U.S. at 404, 406; *Thomas*, 450 U.S. at 717.

IV. THE COURT SHOULD TAKE THE OPPORTUNITY TO REEXAMINE *EMPLOYMENT DIVISION V. SMITH*

Concurring in the *Smith* judgment, Justice O'Connor took sharp issue with the Court's "unnecessary" "departure from well-settled First Amendment jurisprudence." 494 U.S. at 901, 903. In dissent, Justice Blackmun, joined by Justices Brennan and Marshall, took umbrage with the majority's "wholesale overturning of settled law concerning the Religion Clauses of our Constitution." *Id.* at 908.[30] Concurring in *Church of the Lukumi Babalu Aye v. City of Hialeah*, 113 S. Ct. 2217, 2240 (1993) Justice Souter expressed his "doubts about whether the *Smith* rule merits adherence."[31]

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[30] *See Thomas*, 450 U.S. at 717; *Yoder*, 406 U.S. at 219-20.

[31] Justice Souter also concluded that there are "serious questions about the *Smith* rule's consonance with the original understanding and purpose of the Free Exercise Clause." 113 S. Ct. at 2249.

In addition to receiving significant criticism from members of the Court, the majority opinion in *Smith* has been severely criticized by legal scholars as well. *See* McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. Chi. L. Rev. 1109 (1990); Sherwin, *Rhetorical Pluralism and the Discourse Ideal: Countering Division of Employment v. Smith, A Parable of Pagans, Politics, and Majoritarian Rule*, 85 N.W.U.L. Rev. 388 (1991); Tribe, *Levels of Generality in the Definition of Rights*, 57 U. Chi L. Rev. 308 (1991); Hall, *Roger Williams and the Foundations of Religious Liberty*, 71 B.U.L. Rev. 455 (1991); Duncan, 69 N. Dame L. Rev. 393.

Congress' disfavor for the majority opinion in *Smith* is vividly reflected by RFRA. Congress based its enactment of RFRA upon the following specific findings: "(1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution; (2) laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise; (3) governments should not substantially burden religious exercise without compelling justification; (4) in *Employment Division v. Smith*, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and (5) the compelling interest test as set forth in prior federal court rulings is a workable test for striking sensible balances

between religious liberty and competing prior governmental interests." 42 U.S.C. § 2000bb(a).

The *Smith* test provides little, if any, protection to religious liberty. Lower federal courts have applied the *Smith* rule with a vengeance, and have denied religious adherents free exercise protection in a wide array of circumstances.[32] The severe nature of *Smith's* application is best exemplified by the opinion of the Eighth Circuit in *Salaam v. Lockhart*, 905 F.2d 1168, 1171 n.7 (8th Cir. 1990) where, in a prisoner's case, the court said "[w]e do not believe that the Supreme Court's recent decision in *Employment Division v. Smith* . . . affects our analysis . . . *Smith* does not alter the rights of prisoners; *it simply brings the free exercise rights of private citizens closer to those of prisoners.*" (emphasis added).

In response, several state courts have interpreted their own constitutions to provide a safe haven for free exercise. *See French* (supra); *Donahue* (supra); *Smith v. Comm'n* (supra); *Desilets* (supra); *Minnesota v. Hershberger*,

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[32] *See, e.g., St. Bartholomew's Church v. City of New York*, 914 F.2d 348 (2d Cir 1990) (church loses free exercise challenge to the City Landmark Commission's designation of the church buildings as historic landmarks thus restricting the church's ability to renovate); *Salvation Army v. Department of Community Affairs*, 919 F.2d 183 (3d Cir. 1990) (Salvation Army subjected to a myriad of regulations in order to provide housing to homeless); *Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464 (8th Cir. 1991) (church loses challenge to zoning ordinance preventing location in desired area); *You Vang Yang v. Sturner*, 728 F. Supp. 845 (D.R.I. 1990) (Hmong family loses in objection to routine autopsy of son who died of a seizure); *Montgomery v. County of Clinton, Mich.*, 743 F. Supp. 1253 (W.D. Mich. 1990) *aff'd* 940 F.2d 661 (6th Cir. 1991) (same).

462 N.W.2d 393 (Minn. 1990). Other states provide only the protection of *Smith* (*see First Covenant Church v. City of Seattle*, 840 P.2d 174 (Wash. 1993)) or some minimal variance (*see Swanner*). The present state of Constitutional protection for the fundamental right to religious liberty is a hodge podge of conflicting tests which vary from jurisdiction to jurisdiction.

As Justice Souter put it in *Hialeah*, the *Smith* rule creates an "intolerable tension in free exercise law[,] . . . [o]ur cases now present competing answers to the question when government, while pursuing secular ends, may compel disobedience to what one believes religion commands." 113 S. Ct. at 2248, 2250. Justice Souter reasoned that the *Smith* rule can, and should be, "reexamined consistently with principles of *stare decisis*" when an appropriate case presents itself. *Id.* at 2247. This is such an appropriate case. RFRA does not adequately resolve the existing tension and is not sufficient to protect religious freedom from the ill effects of *Smith*. As an Act of Congress, RFRA can be repealed or overridden at any time. Duncan, N. Dame L. Rev. at 443 n.221. The Court should grant Swanner's petition so that it may squarely face and resolve the existing tension and restore the Constitutional protection for religious freedom which the Framers intended. *Hialeah*, 113 S. Ct. at 2249 (Souter, J. concurring).

CONCLUSION

For the reasons stated, the Court should grant the petition for a writ of certiorari to the Supreme Court of the State of Alaska.

Respectfully submitted,

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Dated: July 21, 1994

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF ALASKA

TOM SWANNER, d/b/a/ WHITEHALL PROPERTIES, Appellant, v. ANCHORAGE EQUAL RIGHTS COMMISSION, PAUL L. CONNERTY, EXECUTIVE DIRECTOR, ex rel, JOSEPH BOWLES, WILLIAM F. HARPER, and DEE MOOSE, Appellees.	Supreme Court No. S-5362 ORDER (Filed May 13, 1994)

Superior Court No. 3AN-91-1898 Civil

Before: Moore, Chief Justice, Rabinowitz, Matthews, and Compton, Justices.

On consideration of the petition for rehearing, filed on February 25, 1994, and the response, filed on March 14, 1994,

IT IS ORDERED:

1. The petition for rehearing is GRANTED.

2. The majority opinion, Opinion No. 4049, published on February 11, 1994, is WITHDRAWN.

3. Opinion No. 4081 is issued on this date in its place.

4. The major modifications in the opinion follow:

(a) A new footnote 9, attached to "United States Constitution" on page 12 is added:

Shortly before the publication of this opinion, the United States Congress passed the Religious Freedom Restoration Act of 1993, 107 Stat. 1488 (1993). That Act replaced the *Smith* test with the compelling interest test. Assuming that the Act is constitutional and applies to this case, it does not affect the outcome, because we hold in the next section that compelling state interests support the anti-discrimination laws. The most effective tool the state has for combatting discrimination is to prohibit discrimination. Consequently, the means are narrowly tailored and there is no less restrictive alternative.

(b) Former footnote 9 at pages 12-13 of the February 11, 1994, majority opinion is deleted.

(c) The modified majority opinion on rehearing will be issued as a Per Curiam opinion since former Justice Burke did not participate in the court's consideration of the petition for rehearing.

Entered by direction of the Court at Anchorage, Alaska, on May 13, 1994.

CLERK OF THE
SUPREME COURT

/s/ Jan Hansen
JAN HANSEN

IN THE SUPREME COURT OF THE STATE OF ALASKA

TOM SWANNER, d/b/a/ WHITEHALL PROPERTIES, Appellant, v. ANCHORAGE EQUAL RIGHTS COMMISSION, PAUL L. CONNERTY, EXECUTIVE DIRECTOR, ex rel, JOSEPH BOWLES, WILLIAM F. HARPER, and DEE MOOSE, Appellees.	Supreme Court No. S-5362 Superior Court No. 3AN-91-1898 CI OPINION [No. 4081 – May 13, 1994]

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Karen L. Hunt, Judge.

Appearances: Stephen S. DeLisio, Staley DeLisio & Cook, Anchorage, for Appellant. Constance E. Livsey, Faulkner, Banfield, Doogan & Holmes, Anchorage, for Appellees.

Before: Moore, Chief Justice, Rabinowitz, Matthews and Compton, Justices.

PER CURIAM
MOORE, Chief Justice, dissenting.

Swanner, d/b/a Whitehall Properties, appealed the superior court's decision which affirmed the Anchorage Equal Rights Commission's (AERC) order that Swanner's policy against renting to unmarried couples constituted unlawful discrimination based on marital status. Swanner disputes the decision and contends that enforcing the applicable statute and municipal ordinance violates his constitutional right to free exercise of his religion under the United States and Alaska Constitutions. Swanner claims the AERC deprived him of due process by adopting the hearing examiner's recommended decision and proposed order without itself conducting an independent review of the case on its merits and by failing to notify him that it would do so.

We hold that Swanner discriminated against the potential tenants based on their marital status. We further hold that enforcing the fair housing laws does not deprive him of his right to free exercise of his religion. The proceedings of the AERC did not deprive Swanner of his right to due process of law. We affirm the AERC and superior court decisions.

I. FACTS AND PROCEEDINGS BELOW

Joseph Bowles, William F. Harper, and Dee Moose filed three separate complaints of marital status discrimination in the rental of real property in Anchorage. The complainants alleged that Tom Swanner, doing business as Whitehall Properties, violated municipal and state anti-discrimination laws, Anchorage Municipal Code (AMC) 5.20.020 and AS 18.80.240. Swanner refused to rent or allow inspection of residential properties after

learning that each complainant intended to live with a member of the opposite sex to whom he or she was not married.

While Swanner did not specifically recall having conversations with Bowles, Harper, or Moose, he readily admitted having a policy of refusing to rent to any unmarried couple who intend to live together on the property. Swanner's refusal to rent or show property to unmarried couples is based on his Christian religious beliefs. Under Swanner's religious beliefs, even a non-sexual living arrangement by roommates of the opposite sex is immoral and sinful because such an arrangement suggests the appearance of immorality. It is undisputed that Swanner rejected each complainant as a tenant because of this policy and for no other reason.

A. Proceedings Before the Anchorage Equal Rights Commission

The AERC consolidated the three cases for hearing and appointed Robert W. Landau as hearing examiner on April 6, 1990. Landau conducted a hearing on October 9 and 11, 1990 and issued a twenty-five page Recommended Decision and proposed order in favor of the complainants on January 7, 1991. He served the recommended decision to Swanner's counsel and the AERC on January 7, 1991.

Pursuant to the AERC's administrative rules of procedure in effect at the time, each party had ten days after receipt of the recommended decision to submit written objections. AMC 5.10.015(A). When the AERC receives objections, the regulations provide for its review of the

record and modification of the recommended decision where appropriate. AMC 5.10.015(B). If the parties fail to object, the proposed decision automatically becomes final. AMC 5.10.015(A). Neither Swanner nor the AERC submitted written objections. On January 23, 1991, the AERC issued a memorandum stating that, pursuant to AMC 5.10.015(A), the parties' failure to object to the hearing examiner's recommended decision resulted in his proposed order becoming final on January 22, 1991. On January 31, 1991, Cheri C. Jacobus, AERC Chairperson, issued a Notice of Final Order which affirmed that the proposed order became final on January 22, 1991.

B. Proceedings Before the Superior Court

Swanner appealed to the superior court on March 8, 1991. Judge Karen L. Hunt heard oral argument on May 15, 1992 and issued a written decision and order on August 31, 1992. She affirmed the AERC's decision, holding that (a) Swanner's conduct constituted unlawful discrimination based upon marital status; (b) enforcement of the state and municipal anti-discrimination laws does not violate Swanner's constitutional rights, pursuant to the U.S. Supreme Court's decision in *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990), and our decisions in *Frank v. State*, 604 P.2d 1068 (Alaska 1979) and *Seward Chapel, Inc. v. City of Seward*, 655 P.2d 1293 (Alaska 1982); and (c) the automatic finalization of the AERC's decision did not violate Swanner's due process rights.

C. Proceedings Before This Court

Swanner appealed to this court on September 18, 1992. He contends that the superior court erred in finding that he discriminated against the complainants on the basis of marital status. He claims that he does not discriminate based on marital status, but even if he does, he is excused from compliance with the anti-discrimination laws because of his fundamental right to the free exercise of his religion, guaranteed by the Alaska and United States Constitutions. He also claims that the automatic finalization of the AERC's decision violates his due process rights under the Alaska and United States Constitutions.[1]

II. DISCUSSION

A. Swanner Violated AMC 5.20.020 and AS 18.80.240 by Discriminating Based on Marital Status

Swanner argues that he does not discriminate against individuals based on their marital status because he will rent to people who are single, married, widowed, divorced, or separated. However, he will not rent to those

[1] Each issue involves the interpretation and construction of laws and regulations. On questions of law arising on appeal which do not involve particularized agency expertise, this court applies its independent judgment. *Kodiak Island Borough v. State of Alaska. Dep't of Labor*, 853 P.2d 1111, 1113 (Alaska 1993); *Alaska Transp. Comm'n v. Airpac. Inc.*, 685 P.2d 1248, 1252 (Alaska 1984). Thus, as the superior court found and both parties agree, the substitution of judgment standard is the appropriate standard of review on the issues Swanner has raised.

whom he expects will engage in conduct repugnant to his religious beliefs, namely cohabitation outside of marriage. Swanner considers such cohabitation to be fornication and immoral.

The AERC responds that the laws at issue do not recognize a distinction between "marital status" and "cohabitation." The AERC claims the statutes' plain language demonstrates that "marital status" includes cohabitating couples.

In *Foreman v. Anchorage Equal Rights Comm'n*, 779 P.2d 1199, 1201-03 (Alaska 1989), we looked at the plain language of AS 18.80.240[2] and AMC 5.20.020[3] and reviewed

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[2] Alaska Statute 18.80.240 states:

Unlawful practices in the sale or rental of real property. It is unlawful . . .

(1) to refuse to sell, lease, or rent the real property to a person because of sex, marital status, changes in marital status,

. . . .

(3) to make a written or oral inquiry or record of the sex, marital status, changes in marital status . . . of a person seeking to buy, lease or rent real property;

. . . .

(5) to represent to a person that real property is not available for inspection, sale, rental, or lease when in fact it is so available, or to refuse to allow a person to inspect real property because of the . . . marital status, change in marital status . . . of that person

. . . .

[3] AMC 5.20.020 provides:

Except in the individual home wherein the renter or lessee would share common living areas with the

the intent behind the anti-discrimination laws. In *Foreman*, a landlord who refused to rent to an unmarried couple argued that the laws did not protect the interests of unmarried couples. *Id.* at 1201. We held that the landlord's policy against renting to unmarried couples unlawfully discriminated on the basis of marital status. *Id.* at 1203. We reasoned that because the landlord would have rented to the prospective tenants had they been married, and he refused to rent the property only after learning the couple was not married, "[t]his constitutes unlawful discrimination based on marital status." *Id.* The same reasoning applies here. Because Swanner would have rented the properties to the couples had they been married, and he refused to rent the property only after he learned they were not, Swanner unlawfully discriminated on the basis of marital status.[4]

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owner, lessor, manager, agent or other person, it is unlawful . . .

A. To refuse to . . . rent the real property to a person because of . . . marital status . . . ;

. . .

C. To make a written or oral inquiry or record of the . . . marital status . . . of a person seeking to . . . rent real property;

. . .

E. To represent to a person that real property is not available for inspection . . . [or] rental . . . when in fact it is available, or to refuse a person the right to inspect real property, because of the . . . marital status . . . of that person . . . ;

[4] Swanner agrees that the laws at issue forbid discrimination on the basis of marital status. However, he contends that he did not discriminate against anyone on the basis of his or her marital status. Instead, he asserts that he discriminates on the basis of conduct, which is not prohibited by the statutes.

B. Enforcement of AMC 5.20.020 and AS 18.80.240 Does Not Violate Swanner's Constitutional Right to the Free Exercise of His Religion Under the United States Constitution

Swanner contends that enforcement of AMC 5.20.020 and AS 18.80.240 against him has a coercive effect on the free exercise of his religious beliefs. He believes that compliance with these laws forces him to choose between his religious beliefs and his livelihood. He requests that we accommodate his religious beliefs by creating an exemption to the statute and ordinance. The AERC responds that "it is not Swanner's religious beliefs *per se* which run afoul of our anti-discrimination laws, but rather his actions and conduct in a commercial setting."

The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . . " U.S. Const. amend. I. The Free Exercise Clause applies to the states by its incorporation

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The definition of "cohabit" demonstrates that marital status and conduct are inextricably combined. "Cohabit" means "to live together in a sexual relationship when not legally married." *The American Heritage Dictionary* 259 (1980). Swanner cannot reasonably claim that he does not rent or show property to cohabitating couples based on their conduct (living together outside of marriage) and not their marital status when their marital status (unmarried) is what makes their conduct immoral in his opinion. The undisputed facts demonstrate that Swanner would have rented to the prospective tenants if they were married. Swanner's argument that he discriminated against the prospective tenants based on their conduct and not their marital status is without merit.

into the Fourteenth Amendment. *See Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). It grants absolute protection to freedom of belief and profession of faith, but only limited protection to conduct dictated by religious belief. *See Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872 (1990) (narrowing the scope of religious exemptions under the Free Exercise Clause by upholding a statute that criminalized peyote use, as applied to Native American religious ceremonies).

Swanner claims that we should apply the "compelling state interest" test set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963), to determine whether the laws at issue violate his right to free exercise of religion under the United States Constitution.[5] However, in *Smith*, the United States Supreme Court expressly rejected applying the *Sherbert* test where the law being challenged is generally applicable, or, in other words, where the law is not directed at any particular religious practice or observance.[6] *Smith*, 494 U.S. at 885. "[A] law that is neutral and

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[5] Under this balancing test, a law that incidentally burdens a religious practice must be justified by a compelling governmental interest. *See Sherbert*, 374 U.S. at 403, 406.

[6] The Court stated:

> We conclude today that the sounder approach, and the approach in accord with the vast majority of our precedents, is to hold the test inapplicable to such challenges. The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development." To make an individual's obligation to obey such a law contingent upon the

of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Church of Lukumi Babalu Aye v. City of Hialeah*, 113 S. Ct. 2217, 2226 (1993) (citing *Smith*, 494 U.S. 872 (1990)).[7] "Neutrality and general applicability are interrelated. . . . [F]ailure to satisfy one requirement is a likely indication that the other has not been satisfied. A law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Id.* at 2226.

The first step in determining whether a law is neutral is whether it discriminates on its face. "A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context." *Id.* at 2227. Neither the ordinance nor the statute contain any language singling out any religious group or practice.

> law's coincidence with his religious beliefs, except where the State's interest is "compelling" – permitting him, by virtue of his beliefs, "to become a law unto himself," – contradicts both constitutional tradition and common sense.

494 U.S. at 885 (citations and footnote omitted).

[7] In *Church of Lukumi Babalu Aye v. City of Hialeah*, 113 S. Ct. 2217 (1993), the Court used the Free Exercise Clause to strike down city ordinances that regulated animal sacrifice, but effectively prohibited only sacrifice practices of the Santeria religion. The Court held the ordinances failed to satisfy the *Smith* requirements because they were not neutral, generally applicable, nor narrowly tailored, and did not advance compelling governmental interests.

Even when a law is facially neutral, however, it may not be neutral if it is crafted to impede particular religious conduct. *Id.* These laws clear that hurdle as well. The purpose of AMC 5.20.020 and AS 18.80.240 is to prohibit discrimination in the rental housing market.[8] Swanner does not claim that the purpose of the laws is to discriminate against people based on religion; in fact, he contends that the laws do not even cover this kind of discrimination. Therefore, the laws satisfy the requirement of neutrality.

Additionally, these laws are generally applicable. They apply to all people involved in renting or selling property, and do not specify or imply applicability to a

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[8] Alaska Statute 18.80.200 states the purpose of the anti-discrimination laws:

> (a) It is determined and declared as a matter of legislative finding that discrimination against an inhabitant of the state because of race, religion, color, national origin, age, sex, physical or mental disability, marital status, changes in marital status, pregnancy or parenthood is a matter of public concern and that this discrimination not only threatens the rights and privileges of the inhabitants of the state but also menaces the institutions of the state and threatens peace, order, health, safety and general welfare of the state and its inhabitants.
>
> (b) Therefore, it is the policy of the state and the purpose of this chapter to eliminate and prevent discrimination in employment, in credit and financing practices, in places of public accommodation, in housing accommodations and in the sale, lease, or rental of real property because of race, religion, color, national origin, sex, age, physical or mental disability, marital status, changes in marital status, pregnancy or parenthood.

particular religious group. Therefore, at least under the general rule, no compelling state interest is necessary.

Smith provides one ground for judicial exemptions from compliance with neutral laws of general applicability. A court may exempt an individual from a law where the facts present a hybrid situation where an additional constitutionally protected right is implicated. *Smith*, 494 U.S. at 881-82. Like the appellant in *Smith*, Swanner does not contend that the laws in question here infringe on any constitutional right other than his right to free exercise of religion. Consequently, this case does not present such a "hybrid" situation.

We conclude that enforcing AMC 5.20.020 and AS 18.80.240 against Swanner does not violate his right to free exercise of religion under the United States Constitution.[9]

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[9] Shortly before the publication of this opinion, the United States Congress passed the Religious Freedom Restoration Act of 1993, 107 Stat. 1488 (1993). That act replaced the *Smith* test with the compelling interest test. Assuming that the Act is constitutional and applies to this case, it does not affect the outcome, because we hold in the next section that compelling state interests support the prohibitions on marital status discrimination. The most effective tool the state has for combatting discrimination is to prohibit discrimination; these laws do exactly that. Consequently, the means are narrowly tailored and there is no less restrictive alternative.

C. Enforcement of AMC 5.20.020 and AS 18.80.240 Does Not Violate Swanner's Constitutional Right to the Free Exercise of His Religion Under the Alaska Constitution

Swanner does not dispute that the ordinance and statute are generally applicable and neutral under *Smith*, but asserts that "this decision does not mandate use of a less restrictive standard by state courts in interpreting state constitutional protection."

Swanner is correct in asserting that a state court may provide greater protection to the free exercise of religion under the state constitution than is now provided under the United States Constitution. *See, e.g., Roberts v. State*, 458 P.2d 340, 342 (Alaska 1969) ("We are not bound in expounding the Alaska Constitution's Declaration of Rights by the decisions of the United States Supreme Court, past or future, which expound identical or closely similar provisions of the United States Constitution."). Thus, even though the Free Exercise Clause of the Alaska Constitution is identical to the Free Exercise Clause of the United States Constitution, we are not required to adopt and apply the *Smith* test to religious exemption cases involving the Alaska Constitution merely because the United States Supreme Court adopted that test to determine the applicability of religious exemptions under the United States Constitution. We will apply *Frank v. State*, 604 P.2d 1068 (Alaska 1979), to determine whether the anti-discrimination laws violate Swanner's right to free exercise under the Alaska Constitution.[10]

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[10] Swanner notes that two jurisdictions have held that a landlord may refuse to rent to unmarried couples because of his/her religious beliefs. He cites to decisions from Minnesota

In *Frank, v. State,* we adopted the *Sherbert* test to determine whether the Free Exercise Clause of the Alaska

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and California for the proposition that enforcement of the anti-discrimination laws against him violates his right to free exercise. In *Minnesota v. French,* 460 N.W.2d 2 (Minn. 1990), the Minnesota Supreme Court held that a landlord's refusal to rent to an unmarried couple did not violate Minnesota's anti-discrimination laws and enforcing such laws would violate the landlord's free exercise right. However, in *French,* the anti-discrimination laws at issue did not define or otherwise explain the term "marital status." The court concluded that the Minnesota Legislature did not intend to include unmarried couples in the definition. *Cf. Foreman,* 779 P.2d at 1203 (holding unmarried couples are included within the state and municipal prohibitions against discrimination based on marital status). Moreover, the Minnesota court relied on the criminal anti-fornication statute then in effect. In contrast, Alaska's fornication provision was repealed well before the discriminatory conduct giving rise to this case occurred. *Compare French,* 460 N.W.2d at 10, *with Foreman,* 779 P.2d at 1202. Further, the *French* court relied on the Minnesota Constitution, article I, section 16, which contains very different language from the Alaska Constitution. *See French,* 460 N.W.2d at 9.

In *Donahue v. Fair Employment Housing Comm'n,* 2 Cal. Rptr. 32 (Cal. App. 1991), *review granted and opinion superseded,* 825 P.2d 766 (Cal 1992), *review dismissed as improvidently granted and remanded,* 859 P.2d 671 (Cal. 1993), the California Court of Appeal held that although the landlords' conduct did constitute prohibited marital status discrimination, the landlords were entitled to an exemption from the anti-discrimination laws because of their religious beliefs. The court based its decision "on independent state constitutional grounds." 2 Cal. Rptr. 2d at 40. However, the California Supreme Court depublished the court of appeal's opinion, thereby rendering the decision uncitable.

Neither case provides this court with meaningful guidance in interpreting the Free Exercise Clause of the Alaska Constitution.

Constitution requires an exemption to a facially neutral law.[11] 604 P.2d at 1070. We held that to invoke a religious exemption, three requirements must be met: (1) a religion is involved, (2) the conduct in question is religiously based, and (3) the claimant is sincere in his/her religious belief. *Id.* at 1071 (citing *Wisconsin v. Yoder,* 406 U.S. 205, 215-16 (1972)). Once these three requirements are met, "[r]eligiously impelled actions can be forbidden only 'where they pose some substantial threat to public safety, peace or order, or where there are competing governmental interests 'of the, highest order and . . . [are] not otherwise served. . . . ' " *Seward Chapel, Inc. v. City of Seward,* 655 P.2d 1293, 1301 n.33 (Alaska 1982) (quoting *Frank,* 604 P.2d at 1070).

Swanner clearly satisfies the first and third requirements to invoke an exception to the laws under the Free Exercise Clause. No one disputes that a religion is involved here (Christianity), or that Swanner is sincere in his religious belief that cohabitation is a sin and by renting to cohabitators, he is facilitating the sin. However, the superior court held that he did not meet the second requirement that his conduct was religiously based because "[n]othing in the record permits a finding that refusing to rent to cohabiting unmarried couples is a religious ritual, ceremony or practice deeply rooted in religious belief." Swanner's claim that the superior court

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[11] In *Seward Chapel, Inc. v. City of Seward,* this court held, "Our ruling in *Frank* establishes that there are situations in which the Alaska Constitution requires the state or a municipality to except from a facially neutral law persons whose religious beliefs dictate that they not comply with the law." 655 P.2d 1293, 1301 (Alaska 1982) (footnote omitted).

misinterpreted *Frank v. State* as limiting free exercise rights only to ritual or ceremony has merit. In *Frank*, we determined that the action at issue was a practice deeply rooted in religion. 604 P.2d at 1072-73. However, we did not intend to limit free exercise rights only to actions rooted in religious rituals, ceremonies, or practices. To meet the second requirement, a party must demonstrate that the conduct in question is religiously based; this determination is not limited to actions resulting from religious rituals. Swanner's refusal to rent to unmarried couples is not without an arguable basis in some tenets of the diverse Christian faith, and therefore, his conduct is sufficiently religiously based to meet our constitutional test. Although Swanner meets the three preliminary requirements to invoke an exception to the anti-discrimination laws, the analysis does not end here.

As discussed previously, a religious exemption will not be granted if the religiously impelled action poses "some substantial threat to public safety, peace or order or where there are competing state interests of the highest order." *Frank*, 604 P.2d at 1070. The question is whether Swanner's conduct poses a threat to public safety, peace or order, or whether the governmental interest in abolishing improper discrimination in housing outweighs Swanner's interest in acting based on his religious beliefs.

In our view, the second part of the test adopted in *Frank* is applicable here. Under this part of the *Frank* test, we must determine whether "a competing state interest of the highest order exists." "The question is whether that interest, or any other, will suffer if an exemption is granted to accommodate the religious practice at issue." *Frank*, 604 P.2d at 1073. The government possesses two

interests here: a "derivative" interest in ensuring access to housing for everyone, and a "transactional" interest in preventing individual acts of discrimination based on irrelevant characteristics. Most free exercise cases, including *Frank*, involve "derivative" state interests. In other words, the State does not object to the particular activity in which the individual would like to engage, but is concerned about some other variable that the activity will affect. This can be contrasted with a "transactional" interest in which the State objects to the specific desired activity itself.

For example, in *Frank*, this court exempted a Central Alaska Athabascan Indian needing moose meat for a funeral potlatch from state hunting regulations. The State did not object to killing moose per se (indeed, it expressly allows moose hunting in season); the State's derivative interest was in maintaining healthy moose populations. In the instant case, the government's derivative interest is in providing access to housing for all. One could argue that if a prospective tenant finds alternative housing after being initially denied because of a landlord's religious beliefs, the government's derivative interest is satisfied. However, the government also possesses a transactional interest in preventing acts of discrimination based on irrelevant characteristics regardless of whether the prospective tenants ultimately find alternative housing.

We look to *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158 (1943), as an analogy. In *Prince*, the United States Supreme Court refused to grant an exemption to child labor laws for children distributing religious literature. As in this case, the state had a transactional interest: preventing exploitation of children in employment. Thus,

the state objected to child labor, the particular activity at issue, per se, not to an effect of that activity. The state legislature had prohibited children from working under certain conditions. Therefore, permitting any child to work under such conditions resulted in harming the government's transactional interest. This transactional government interest does not involve a numerical cutoff below which the harm is insignificant unlike in *Frank*.

Similarly, in the instant case, the legislature and municipal assembly determined that housing discrimination based on irrelevant characteristics should be eliminated. *See Hotel, Motel, Restaurant, Etc. Union Local 879 v. Thomas*, 551 P.2d 942, 945 (Alaska 1976) ("[T]he statutory scheme constitutes a mandate to the agency to seek out and eradicate discrimination in . . . the rental of real property."); *Loomis Electronic Protection, Inc. v. Schaefer*, 549 P.2d 1341, 1343 (Alaska 1976) (recognizing the Alaska Legislature's "strong statement of purpose in enacting AS 18.80, and its avowed determination to protect the civil rights of all Alaska citizens"); *see also* AS 18.80.200; AMC 5.10.010. The existence of this transactional interest distinguishes this case from *Frank* and most other free exercise cases where courts have granted exemptions. The government's transactional interest in preventing discrimination based on irrelevant characteristics directly conflicts with Swanner's refusal to rent to unmarried couples. The government views acts of discrimination as independent social evils even if the prospective tenants ultimately find housing. Allowing housing discrimination that degrades individuals, affronts human dignity, and

limits one's opportunities results in harming the government's transactional interest in preventing such discrimination. Under *Frank*, this interest will clearly "suffer if an exemption is granted to accommodate the religious practice at issue."

The dissent attempts to prove that the state does not view marital status discrimination in housing as a pressing problem by pointing to other areas in which the state itself discriminates based on marital status. However, those areas are easily distinguished. The government's interest here is in specifically eliminating marital status discrimination in housing, rather than eliminating marital status discrimination in general. Therefore, the other policies which allow marital status discrimination are irrelevant in determining whether the government's interest in eliminating marital status discrimination in housing is compelling.

In the examples the dissent cites, treating married couples differently from unmarried couples is arguably necessary to avoid fraudulent availment of benefits available only to spouses. The difficulty of discerning whose bonds are genuine and whose are not may justify requiring official certification of the bonds via a marriage document. That problem is not present in housing cases: as this case demonstrates, if anything, an unmarried couple who wish to live together are at a disadvantage if they claim to be romantically involved.

It is important to note that any burden placed on Swanner's religion by the state and municipal interest in eliminating discrimination in housing falls on his conduct and not his beliefs. Here, the burden on his conduct

affects his commercial activities. In *United States v. Lee*, 455 U.S. 252 (1982), the United States Supreme Court stated the distinction between commercial activity and religious observance:

> When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith, are not to be superimposed on the statutory schemes which are binding on others in that activity.

Id. at 261.

Swanner complains that applying the anti-discrimination laws to his business activities presents him with a "Hobson's choice" – to give up his economic livelihood or act in contradiction to his religious beliefs. A similar argument was advanced in *Seward Chapel*, where Seward Chapel argued that applying the city zoning ordinances to prohibit construction of a parochial school impermissibly burdened the chapel's free exercise rights. 655 P.2d at 1299. We concluded that "there has been no showing of a religious belief which requires members of Seward Chapel to locate in [a specific place]. . . . [T]he inconvenience and economic burden of which Seward Chapel now complains is caused largely by the choice to build in [a specific place] . . . " *Id.* at 1302 (footnote omitted).

Swanner has made no showing of a religious belief which requires that he engage in the property-rental business. Additionally, the economic burden, or "Hobson's choice," of which he complains, is caused by his choice to enter into a commercial activity that is regulated by anti-discrimination laws. Swanner is voluntarily engaging in property management. The law and ordinance regulate

unlawful practices in the rental of real property and provide that those who engage in those activities shall not discriminate on the basis of marital status. *See* AS 18.80.240; AMC 5.20.020. Voluntary commercial activity does not receive the same status accorded to directly religious activity. *Cf. Frank v. State*, 604 P.2d at 1075 (exempting an Athabascan Indian from state hunting regulations "to permit the observance of the ancient traditions of the Athabascans").

"As [James] Madison summarized the point, free exercise should prevail in every case where it does not trespass on private rights or the public peace." Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 Chi. L. Rev. 1109, 1145 (1990) (citation omitted). Because Swanner's religiously impelled actions trespass on the private right of unmarried couples to not be unfairly discriminated against in housing, he cannot be granted an exemption from the housing anti-discrimination laws. Therefore, we conclude that enforcement of AMC 5.20.020 and AS 18.80.240 against Swanner does not violate his right to free exercise of religion under the Alaska Constitution.

D. The AERC Did Not Deprive Swanner of Due Process of Law

1. AMCR 5.10.015(A) is Not an Unconstitutional Delegation by the AERC

Anchorage Municipal Code 5.10.040 authorizes the AERC: (a) to hold public hearings; (b) to administer oaths and issue subpoenas; (h) to delegate to its executive director all powers and duties except the power to hold

hearings and issue orders; and (i) to adopt procedural and evidentiary rules necessary to fulfill the intent of Title 5. AMC 5.10.040. The AERC's power to "adopt procedural and evidentiary rules" is effectuated by promulgating municipal regulations.

Anchorage Municipal Code of Regulations (AMCR) provides the scope of the hearing examiner's recommendation.

> The hearing examiner . . . shall rule on the admissibility of evidence and other procedural matters. On any question which would be determinative of the jurisdiction of the commission or of the culpability of any party, the hearing examiner . . . may only make recommendations to the full commission.

AMCR 5.10.013(C)(2).[12] Additionally, "[a]ll recommendations of the hearing examiner . . . shall be consistent with commission decisions and regulations." AMCR 5.10.013(C)(4).

AMCR 5.10.015(A) states:

> After a party . . . receives the hearing examiner's . . . proposed findings of fact, conclusions of law and proposed order, that person or his/her representative may, within 10 days or such other time fixed by the chair, present written objections to the commission. If no party files an objection within ten days, the proposal shall become final.

[12] On February 16, 1993, the AERC repealed AMCR 5.10.013 and 5.10.015. *See* AMCR 5.60.003(F), 5.60.012(C), (D) for the new regulations replacing these sections.

We apply the regulations as they existed when Swanner's case began at the agency level.

Swanner claims that AMCR 5.10.015(A) directly conflicts with AMCR 5.10.013(C)(2) because "[Section] 5.10.015 appears to permit the commission to adopt the hearing examiner's recommendations without ever considering its content, rationale or rectitude." He interprets AMCR 5.10.013(C)(2) as authorizing only "the full commission" to determine a question which is determinative of jurisdiction or of the culpability of a party; Swanner asserts that his culpability in housing discrimination was at issue. He contends that the AERC abdicated its responsibility by adopting the hearing examiner's recommendation, and, therefore, the AERC violated AMCR 5.10.013.

Swanner is correct that the hearing examiner did not have the authority to determine Swanner's culpability. Instead he had the authority to make a recommendation, which is exactly what he did. Hearing Examiner Landau made a recommendation to the AERC and the AERC decided to adopt it. Therefore, no conflict exists between AMCR 5.10.013(C)(2) and AMCR 5.10.015(A), and the AERC followed its own regulations in adopting the hearing examiner's recommendation.[13]

[13] Where an agency interprets its own regulations, a deferential standard of review properly recognizes that the agency is best able to discern its intent in promulgating the regulation at issue. *Rose v. Commercial Fisheries Entry Comm'n*, 647 P.2d 154, 161 (Alaska 1982) (citing Kenneth C. Davis, *Administrative Law Treatise* § 7.22, at 105-08 (2d ed. 1979)).

2. The Regulations Do Not Require an Independent Review by the AERC

Swanner finds fault with this process and complains that the AERC's regulations do not grant it authority to approve a hearing examiner's decision without conducting an independent review. No rule of procedure provides that the AERC must independently review the hearing examiner's recommendations. AMCR 15.10.015(B) expressly provides for the AERC's review of the hearing examiner's recommendations after a party timely files an objection. Swanner did not file an objection; therefore, the regulations required no independent review by the AERC.

3. Due Process Did Not Require That the AERC Personally Notify Swanner That It Would Adopt the Hearing Examiner's Recommendation Absent an Objection Within Ten Days

Swanner claims the AERC's adoption of the hearing examiner's recommendation violated his constitutional right to due process of law. Both the Alaska and United States Constitutions provide that a person shall not be deprived of "life, liberty, or property, without due process of law." Alaska Const., Art. 1, § 7; U.S. Const. amend. XIV, § 1. "Due process requires 'that deprivation of life, liberty or property by adjudication be proceeded by notice . . . appropriate to the nature of the case.' " *Wickersham v. State Com. Fisheries Entry Comm'n*, 680 P.2d 1135, 1144 (Alaska 1984) (quoting *Mullane v. Central Hanover Bank and Trust Co.*, 229 U.S. 306, 313 (1950)). This court held "[a]n elementary and fundamental requirement of

due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action." *Aguchak v. Montgomery Ward Co., Inc.*, 520 P.2d 1352, 1356 (Alaska 1974) (adopting *Mullane* language for analysis under the Alaska Constitution).

Swanner states that he did not receive notice that his failure to object to the hearing examiner's recommended decision would result in the AERC making the decision final. He claims that he became aware of the AERC's intent to approve the hearing examiner's recommended decision the day after objections to the proposed order were due, when the AERC issued a memorandum stating the proposed order became final. Therefore, he claims he was not given "notice reasonably calculated, under all the circumstances, to apprise [him] of the pendency of the action, as required by Alaska law."

Swanner cannot claim that he was unaware of the pendency of this action. The actual hearing in this matter occurred on October 9 and 11, 1990, and Swanner participated in seven months of formal pre-hearing procedures and discovery. Swanner was clearly aware of the "pendency of this action." Moreover, AMCR 5.10.015 was readily available to Swanner and the public from both the AERC and the State Law Library. Accordingly, the AERC did not deny Swanner due process.

III. CONCLUSION

We hold that Swanner impermissibly discriminated against Bowles, Harper, and Moose because he would not rent to them based on their marital status. The Free

Exercise Clause of the United States and Alaska Constitutions do not permit Swanner to disobey the state and municipal anti-discrimination laws by entitling him to an exemption. The AERC did not deny Swanner his right to due process by following its procedural regulations.

The AERC's final order and the superior court's opinion are AFFIRMED.

MOORE, Chief Justice, dissenting.

Article I, section 4 of the Alaska Constitution declares that "[n]o law shall be made respecting an establishment of religion, or prohibiting the free exercise thereof." As the majority correctly recognizes, this provision may provide greater protection of free exercise rights than is now provided under the United States Constitution. Opinion at 12-13. Accordingly, while the United States Supreme Court has adopted a new test to analyze free exercise claims such as the one at issue here,[1] the majority agrees that we will continue to apply the compelling interest test in interpreting the free exercise clause of the Alaska Constitution. Opinion at 13.

Our decision in *Frank v. State*, 604 P.2d 1068 (Alaska 1979), sets forth the framework from which we must determine whether AMC 5.20.020 and AS 18.80.240 violate Swanner's right to the free exercise of his religion. As we stated in *Frank*, "[n]o value has a higher place in our

[1] *See Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872, 884-90 (1990).

constitutional system of government than that of religious freedom." 604 P.2d at 1070. For this reason, a facially neutral statute or ordinance which interferes with religious-based conduct must be justified by a compelling state interest. *Id.* Absent such an interest, our constitution requires an exemption from the laws at issue to accommodate religious practices. *Id.* at 1070-71.

The majority acknowledges that Swanner's actions fall within the ambit of the free exercise clause. Swanner has shown that his refusal to rent apartments to unmarried individuals who plan to live with a member of the opposite sex is based on his Christian faith, which strictly proscribes such cohabitation. No one questions the sincerity of his religious belief that he facilitates a sin by renting to unmarried individuals such as the complainants in this case. *See* Opinion at 15-16. For this reason, Swanner's religiously impelled conduct must be protected under Alaska law unless the AERC can show that the conduct poses "some substantial threat to public safety, peace or order," or that there exist competing governmental interests "of the highest order" which are not otherwise served without limiting Swanner's conduct. *Frank*, 604 P.2d at 1070 (citing *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) and *Sherbert v. Verner*, 374 U.S. 398, 403 (1963)); *Seward Chapel, Inc. v. City of Seward*, 655 P.2d 1293, 1301 n.33 (Alaska 1982). I do not believe the AERC has met its burden in this case. I would therefore grant Swanner an exemption to accommodate his religious beliefs.

First, I note that in determining that the governmental interest in this case is "of the highest order," the majority announces an entirely new and unnecessary test

examining the state's "transactional" and "derivative" interests. Opinion at 16-17. Under this analysis, the majority concludes that the state has a transactional, or *per se*, interest in preventing "individual acts of discrimination based on irrelevant characteristics" which overrides Swanner's free exercise rights in this case. Because the interest is "transactional," the majority concludes that no evidentiary basis is required to show that rental housing for unmarried couples has become scarce. However, before the court would enforce the state's "derivative" interest in "ensuring access to housing for everyone," the AERC apparently would have to make an evidentiary showing that cohabitating couples have experienced hardship in finding available housing, *i.e.*, that Swanner's conduct poses a "substantial threat to public safety, peace or order." *Frank*, 604 P.2d at 1070.

In my opinion, this amorphous analysis of the state's interests ultimately will prove to be useless in resolving future free exercise cases. Even in this case, I do not believe it provides a useful distinction of the interests at issue. For example, the majority determines that the state has a *per se* objection to marital status discrimination in housing which overcomes Swanner's free exercise rights. The majority defines this interest as that in "preventing acts of discrimination based on irrelevant characteristics." Opinion at 17. Such an articulation of the state's interest poses myriad questions. Who is to determine what is an "irrelevant" characteristic? Obviously, marital status is not "irrelevant" to Swanner. It is central to the question whether he will be committing a sin under the dictates of his religion. Is the legislative branch the final arbiter of relevancy or irrelevancy? Further, the discrimination at

issue here is not based on innate "characteristics" but rather on the *conduct* of potential tenants. While this conduct is worthy of some protection, it does not warrant the same constitutional protection given to religiously compelled conduct. I am not willing to place the right to cohabitate on the same constitutional level as the right to freedom from discrimination based on either innate characteristics – such as race or gender – or constitutionally protected belief, such as freedom of religion.

In addition, it remains unclear to me how the state's "derivative" interests are to be identified. Here, that interest is defined with little explanation as being the state's interest in "providing access to housing for all." Opinion at 17. Does this mean the state has no *per se* objection to the fact that some individuals may have limited access to housing? In *Frank*, could it not be said that the state had a *per se* interest in enforcing its hunting regulations?

In *Frank*, this court set forth a workable and sufficient guide to determine whether a governmental interest is sufficiently compelling to overcome an individual's free exercise rights. 604 P.2d at 1070. It seems to me that the majority's effort to expand this analysis adds little to the actual analysis of interests at stake. To the contrary, I see the majority's expansion of *Frank* as little more than a strained effort to distinguish *Frank* from the present situation when such a distinction is not logically justified. In this effort, the majority totally ignores the record in this case, and it engages in a game where the "transactional" or "derivative" label attached to any given state interest predetermines the outcome of the case.

There is no governmental interest "of the highest order" to justify the burden on Swanner's fundamental rights.

Even applying the framework announced by the court in analyzing whether the state's interest is "of the highest order," I cannot agree with the court's reasoning and resulting decision. In essence, the majority's conclusion is that marital status discrimination constitutes such an affront to human dignity that the state has a *per se* obligation "of the highest order" to prevent it. Based on my analysis of free exercise jurisprudence and the issues surrounding marital status discrimination, I cannot conclude that eradication of marital status discrimination in the rental housing industry constitutes a governmental interest of such high order as to justify burdening Swanner's fundamental constitutional rights.[2]

There can be no question that the state has a compelling interest in eradicating discrimination against certain

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[2] Significantly, the majority cites no cases to support the proposition that the state has a compelling interest in eradicating marital status discrimination, particularly when the discrimination at issue must be balanced against interests of constitutional magnitude. Both *Loomis Elec. Protection, Inc. v. Schaefer*, 549 P.2d 1341 (Alaska 1976), and *Hotel, Motel, Restaurant, Constr. Camp Employees and Bartenders Union Local 879 v. Thomas*, 551 P.2d 942 (Alaska 1976), cite the general purpose statement of AS 18.80.200; however, neither case does so to establish the existence of a compelling state interest. Both cases involved gender discrimination, the eradication of which has been held to be a compelling interest, as I discuss *infra*. Neither case is applicable to the instant case, where marital status discrimination is involved and where the discriminating party is asserting a core constitutional freedom.

historically disadvantaged groups. *See, e.g., Bob Jones University v. United States*, 461 U.S. 574, 593-95 (1983) (racial discrimination); *Roberts v. United States Jaycees*, 468 U.S. 609, 625 (1984) (gender discrimination). This compelling interest has been found to exist based on a determination that the discrimination at issue is so invidious to personal dignity and to our concept of fair treatment as to warrant strict protection. There is no question that Swanner's right to freely exercise his religion could and should be burdened if he engaged in such discrimination as a result of his religious beliefs.

This fact does not mean, however, that *every* form of discrimination is equally invidious or that the state's interest in preventing it necessarily outweighs fundamental constitutional rights. Rather, the cases which have upheld an imposition on free exercise have articulated certain specific reasons that some forms of discrimination are of particular governmental interest and deserving of heightened judicial scrutiny. In *Bob Jones University v. United States*, 461 U.S. 574 (1983), for example, the Supreme Court refused to grant tax-exempt status to schools that maintained racially discriminatory policies under their interpretation of the Bible. In doing so, the Court discussed this nation's long history of officially sanctioned racial segregation and discrimination in education. It further noted that, since the late 1950s, every pronouncement of the Supreme Court and myriad Acts of Congress and Executive Orders attested to a national policy prohibiting such discrimination. *Id.* at 594-95, 604. It therefore concluded that "[t]here can no longer be any doubt that racial discrimination in education violates deeply and widely accepted views of elementary justice."

Id. at 592. Accordingly, the government's interest in eradicating racial discrimination in education was found to be compelling.

Similarly, in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), the Supreme Court declared that the state's compelling interest in eradicating discrimination against its female citizens justified any minimal interference with an all-male organization's freedom of expressional association. In analyzing the weight of the state's interest, the Court discussed the invidious nature of gender bias, stating:

> [D]iscrimination based on archaic and overbroad assumptions about the relative needs and capacities of the sexes forces individuals to labor under stereotypical notions that often bear no relationship to their actual abilities. It thereby both deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life.

Id. at 625 (citations omitted). The Court also observed that society generally had recognized the importance of removing "the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups, including women." *Id.* at 626. Based on these conclusions, it was no stretch to find that the state possessed a compelling interest in eradicating gender discrimination, and that this interest was sufficient to overcome the Jaycees' First Amendment claim. *Id.* at 626-29.

The majority today avoids engaging in any similar analysis of marital status discrimination to explain why

or how it is so damaging to human dignity to become of such governmental import as to overcome a fundamental constitutional right.[3] This analysis is critical. The majority cites no evidence that marital status classifications have been associated with a history of unfair treatment that would warrant heightened governmental protection.[4] To the contrary, I believe the law is clear that marital status classifications have been accorded relatively low import

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[3] While the majority contends that its decision today affects only Swanner's conduct, not his religious beliefs, Opinion at 19-20, I do not believe that the Alaska Constitution distinguishes so clearly between religious belief and religious conduct. *See Frank*, 604 P.2d at 1070 (because of the close relationship between conduct and belief, and because of the high value we assign to religious beliefs, religiously impelled actions can be forbidden only where they are outweighed by a compelling governmental interest). *See also Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972) ("[B]elief and action cannot be neatly confined in logic-tight compartments."); *Smith*, 494 U.S. at 893 (O'Connor, J., concurring) ("Because the First Amendment does not distinguish between religious belief and religious conduct, conduct motivated by sincere religious belief, like the belief itself, must therefore be at least presumptively protected by the Free Exercise Clause."). I would hold that conduct that is motivated by sincere religious belief is presumptively protected by Article I, section 4.

[4] The majority pronounces that "the government views acts of discrimination as independent social evils. . . . " Opinion at 18. This analysis ignores the specific issue here: discrimination in housing based on *marital status*. Had Swanner's religious beliefs compelled him to discriminate based on characteristics such as race or gender, I clearly would vote to deny an exemption. However, I am not convinced that marital status discrimination is or should be treated as comparable in any way to race or gender discrimination.

on the scale of interests deserving governmental protection. For instance, the government itself discriminates based on marital status in numerous regards, and there is no suggestion that this practice should be reexamined. Alaska law explicitly sanctions such discrimination. *See, e.g.*, AS 13.11.015 (intestate succession does not benefit unmarried partner of decedent); AS 23.30.215(a) (workers' compensation death benefits only for surviving spouse, child, parent, grandchild, or sibling); Alaska R. Evid. 505 (no marital communication privilege between unmarried couples); *Serradell v. Hartford Accident & Indemn. Co.*, 843 P.2d 639, 641 (Alaska 1992) (no insurance coverage for unmarried partner under family accident insurance policy).

In addition, marital status classifications have never been accorded any heightened scrutiny under the Equal Protection Clause of either the federal or the Alaska Constitutions. Disparate treatment of individuals based on classifications such as race, on the other hand, are reviewed under the highest scrutiny. *See, e.g., Korematsu v. United States*, 323 U.S. 214 (1944) (restrictions curtailing the civil rights of a single racial group are immediately suspect and deserve strict scrutiny analysis). Gender-based classifications are similarly analyzed under a heightened level of scrutiny at the federal level. *See, e.g., Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150 (1980) (gender-based discrimination must serve important governmental objectives and the discriminatory means employed must be substantially related to the achievement of those objectives). The sliding scale approach to equal protection analysis under the Alaska Constitution similarly applies a heightened level of scrutiny to laws

burdening racial minorities or other suspect classifications. *See State v. Ostrosky*, 667 P.2d 1184, 1193 (Alaska 1983) ("[L]aws which embody classification schemes that are more constitutionally suspect, such as laws discriminating against racial or ethnic minorities, are more strictly scrutinized."); *State v. Erickson*, 574 P.2d 1, 11-12 (Alaska 1978) (where fundamental rights or suspect categories are involved, equal protection analysis under the Alaska Constitution requires a compelling state interest).

At the federal level, the eradication of marital status discrimination in the housing context clearly has not been treated as a compelling interest.[5] Neither the Federal Fair Housing Act, 42 U.S.C. § 3604 (1988), nor the Federal Civil Rights Act, 42 U.S.C. §§ 1981 and 1982 (1988), would prohibit the precise form of marital status discrimination at issue here, unless it was being used as a pretext for a more egregious form of discrimination, such as that based on race. *See Marable v. H. Walker & Assocs.*, 644 F.2d 390, 397 (5th Cir. 1981) (finding a violation of the fair housing and civil rights statutes only after concluding that, although the landlord asserted that he refused to rent housing based on the applicant's marital status, this excuse was a mere pretext for racial discrimination); *see also* James A. Kushner, *The Fair Housing Amendments Act of 1988: The Second Generation of Fair Housing*, 42 Vand. L.

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[5] While I recognize that Alaska's antidiscrimination legislation is not substantially similar to comparable federal laws – *see, e.g., Hotel, Motel, Restaurant, Constr. Camp Employees and Bartenders Union Local 879 v. Thomas*, 551 P.2d 942, 945 (Alaska 1976) – the majority's failure to cite any authority for a compelling interest at the state level in this case leads me to make this comparison for further guidance.

Rev. 1049, 1106 (1989) (the Fair Housing Act does not protect unmarried couples from a landlord's refusal to rent unless a case can be made that the marital status discrimination is merely a pretext for racial, ethnic, religious or gender-based discrimination).

My research has not revealed a single instance in which the government's interest in eliminating marital status discrimination has been accorded substantial weight when balanced against other state interests, let alone fundamental constitutional rights. I find nothing to suggest that marital status discrimination is so invidious as to outweigh the fundamental right to free exercise of religion.

The majority comments that its result today is justified because Swanner's right to the free exercise of his religious beliefs must be accorded less weight since he has entered the commercial arena. Opinion at 19-21. As discussed above, it is well-accepted that an individual's right to religious freedom will not and cannot always override other interests. *See, e.g., United States v. Lee*, 455 U.S. 252, 261 (1982) (rejecting Amish employer's claim that imposition of social security taxes violated his free exercise rights). However, neither Lee nor any other case of which I am aware stands for the proposition that individuals like Swanner altogether waive their constitutional right to the free exercise of religion simply because a conflict between their religious faith and some legislation occurs in a commercial context. To the contrary, the *Lee* Court recognized that, even in a commercial setting, the state must justify its limitation on religious liberty by showing the limitation is "essential to accomplish an

overriding governmental interest." *Id.* at 257-58. The AERC has simply failed to meet that burden here.

The majority suggests that Swanner's constitutional rights must be accorded lesser weight because he *voluntarily* engages in the property management industry, and his right to engage in that business is not entitled to judicial protection. Opinion at 20-21. However, this court has stated that "the right to engage in an economic endeavor within a particular industry is an 'important' right for state equal protection purposes." *State v. Enserch Alaska Constr., Inc.*, 787 P.2d 624, 632 (Alaska 1989) (citing *Commercial Fisheries Entry Comm'n v. Apokedak*, 606 P.2d 1255, 1266 (Alaska 1980)). The ability to participate in a particular industry, such as rental property management, is therefore entitled to more protection under our state constitution than the majority acknowledges.

The majority incorrectly relies on *Seward Chapel* to arrive at its contrary conclusion. Unlike the present case, *Seward Chapel* did not involve a forced decision between giving up one's livelihood or violating one's religious beliefs. In *Seward Chapel*, we merely found that no religious belief required an exception to city zoning laws prohibiting the location of a parochial school on a specific site. 655 P.2d at 1302. No activity was totally prohibited; only the place in which it could be conducted was being regulated. I believe that there is a significant difference between the inconvenience placed upon Seward Chapel and the total abrogation of Mr. Swanner's right to earn a living in his chosen profession while abiding by his sincerely held religious beliefs.

There is no basis in the record to conclude that an exemption in this case would create a substantial threat of harm.

In *Frank*, this court required that the state establish precisely how its interest would suffer if an exemption was granted to accommodate the religious conduct at issue. 604 P.2d at 1073. Thus, even accepting that the government has a strong interest in assuring available housing, the AERC must show how this interest will suffer in real terms if an exemption is granted to Swanner.

I see no evidence whatsoever in the record to suggest that Swanner's conduct poses a substantial threat to public safety, peace or order such that the burden on Swanner's rights is justified. For this reason, I fail to see why an exemption to accommodate Swanner's religious beliefs is not warranted. Mere speculation that housing for unmarried couples may become scarce if an exemption is granted is insufficient to establish a compelling governmental interest. In *Frank*, we specifically criticized the state for speculating, without any supporting data, that an exemption to moose hunting regulations for an Athabascan funeral potlatch would open the flood gates to widespread poaching. *Id.* at 1074. We stated: " 'Justifications founded only on fear and apprehension are insufficient to overcome rights asserted under the First Amendment.' " *Id.* (quoting *Teterud v. Burns*, 522 F.2d 357, 361-62 (8th Cir. 1975)). We further found that, since the state had not presented any evidence that so many moose would be taken for funeral potlatch ceremonies as to jeopardize appropriate population levels, it had not met

its burden to justify curtailing the religious practice at issue. *Id.*[6]

As in *Frank*, the record here is completely devoid of any evidence to suggest that there are so many landlords or property managers in Anchorage whose religious beliefs are identical to Swanner's as to constitute a substantial threat to available housing. In a city the size of Anchorage, it is difficult to conclude based on intuition alone that housing availability for unmarried couples will become so scarce as to constitute a substantial threat to community welfare. If there were some persuasive evidence to support such a conclusion, I may well have arrived at a different conclusion today.

Conclusion

I believe Swanner has been presented with a Hobson's choice of either complying with the law or abandoning the precepts of his religion. Since the government's interest in

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[6] Our requirement of evidentiary support for the state's refusal to grant an exemption is well-supported by United States Supreme Court precedent. *See Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 719 (1981) (rejecting state's asserted reasons for refusing a religious exemption due to lack of evidence in the record); *Wisconsin v. Yoder*, 406 U.S. 205, 224-29 (1972) (rejecting state's argument concerning the dangers of a religious exemption as speculative and unsupported by the record); *Sherbert v. Verner*, 374 U.S. 398, 407 (1963) ("[T]here is no proof whatever to warrant such fears . . . as those which the [state] now advance[s]."); *see also Smith*, 494 U.S. at 911 (Blackmun, J., dissenting) (state's assertion that religious exemption for peyote use would harm health and safety of state citizens is unsupported and speculative).

this particular law does not outweigh Swanner's fundamental religious rights, Swanner should be granted an exemption to accommodate his beliefs. The AERC relies on nothing more than a pure conclusion that the state has a compelling interest in preventing marital status discrimination in housing. It has not presented any evidence that an exemption in this case would result in a substantial threat to housing availability. Nor does it explain exactly what is so invidious about marital status discrimination as to make its proscription a governmental interest of the highest order, comparable with the state's interest in eradicating racial or gender discrimination. For these reasons, I fail to see how a limited exemption for Swanner and others similarly situated is not justified. In my opinion, the analysis and result set forth in this case will return to haunt this court in future decisions.

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF ALASKA

TOM SWANNER, d/b/a/ WHITEHALL PROPERTIES, Appellant, vs. ANCHORAGE EQUAL RIGHTS COMMISSION, PAUL L. CONNERTY, EXECUTIVE DIRECTOR, ex rel, JOSEPH BOWLES, WILLIAM F. HARPER, and DEE MOOSE, Appellees.	Supreme Court No. S-5362 Superior Court No. 3AN-91-1898 CI OPINION [No. 4049 – February 11, 1994]

On Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Karen L. Hunt, Judge.

Appearances: Stephen S. DeLisio, Staley DeLisio & Cook, Anchorage, for Appellant. Constance E. Livsey, Faulkner, Banfield, Doogan & Holmes, Anchorage, for Appellees.

Before: Moore, Chief Justice, Rabinowitz, Burke, Matthews and Compton, Justices.

BURKE, Justice.
MOORE, Chief Justice, dissenting.

Swanner, d/b/a Whitehall Properties, appealed the superior court's decision which affirmed the Anchorage Equal Rights Commission's (AERC) order that Swanner's policy against renting to unmarried couples constituted unlawful discrimination based on marital status. Swanner disputes the decision and contends that enforcing the applicable statute and municipal ordinance violates his constitutional right to free exercise of his religion under the United States and Alaska Constitutions. Swanner claims the AERC deprived him of due process by adopting the hearing examiner's recommended decision and proposed order without itself conducting an independent review of the case on its merits and by failing to notify him that it would do so.

We hold that Swanner discriminated against the potential tenants based on their marital status. We further hold that enforcing the fair housing laws does not deprive him of his right to free exercise of his religion. The proceedings of the AERC did not deprive Swanner of his right to due process of law. We affirm the AERC and superior court decisions.

I. FACTS AND PROCEEDINGS BELOW

Joseph Bowles, William F. Harper, and Dee Moose filed three separate complaints of marital status discrimination in the rental of real property in Anchorage. The complainants alleged that Tom Swanner, doing business as Whitehall Properties, violated municipal and state anti-discrimination laws, Anchorage Municipal Code (AMC) 5.20.020 and AS 18.80.240. Swanner refused to rent or allow inspection of residential properties after

learning that each complainant intended to live with a member of the opposite sex to whom he or she was not married.

While Swanner did not specifically recall having conversations with Bowles, Harper, or Moose, he readily admitted having a policy of refusing to rent to any unmarried couple who intend to live together on the property. Swanner's refusal to rent or show property to unmarried couples is based on his Christian religious beliefs. Under Swanner's religious beliefs, even a non-sexual living arrangement by roommates of the opposite sex is immoral and sinful because such an arrangement suggests the appearance of immorality. It is undisputed that Swanner rejected each complainant as a tenant because of this policy and for no other reason.

A. Proceedings Before the Anchorage Equal Rights Commission

The AERC consolidated the three cases for hearing and appointed Robert W. Landau as hearing examiner on April 6, 1990. Landau conducted a hearing on October 9 and 11, 1990 and issued a twenty-five page Recommended Decision and proposed order in favor of the complainants on January 7, 1991. He served the recommended decision to Swanner's counsel and the AERC on January 7, 1991.

Pursuant to the AERC's administrative rules of procedure in effect at the time, each party had ten days after receipt of the recommended decision to submit written objections. AMC 5.10.015(A). When the AERC receives objections, the regulations provide for its review of the

record and modification of the recommended decision where appropriate. AMC 5.10.015(B). If the parties fail to object, the proposed decision automatically becomes final. AMC 5.10.015(A). Neither Swanner nor the AERC submitted written objections. On January 23, 1991, the AERC issued a memorandum stating that, pursuant to AMC 5.10.015(A), the parties' failure to object to the hearing examiner's recommended decision resulted in his proposed order becoming final on January 22, 1991. On January 31, 1991, Cheri C. Jacobus, AERC Chairperson, issued a Notice of Final Order which affirmed that the proposed order became final on January 22, 1991.

B. Proceedings Before the Superior Court

Swanner appealed to the superior court on March 8, 1991. Judge Karen L. Hunt heard oral argument on May 15, 1992 and issued a written decision and order on August 31, 1992. She affirmed the AERC's decision, holding that (a) Swanner's conduct constituted unlawful discrimination based upon marital status; (b) enforcement of the state and municipal anti-discrimination laws does not violate Swanner's constitutional rights, pursuant to the U.S. Supreme Court's decision in *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990), and our decisions in *Frank v. State*, 604 P.2d 1068 (Alaska 1979) and *Seward Chapel, Inc. v. City of Seward*, 655 P.2d 1293 (Alaska 1982); and (c) the automatic finalization of the AERC's decision did not violate Swanner's due process rights.

C. Proceedings Before This Court

Swanner appealed to this court on September 18, 1992. He contends that the superior court erred in finding that he discriminated against the complainants on the basis of marital status. He claims that he does not discriminate based on marital status, but even if he does, he is excused from compliance with the anti-discrimination laws because of his fundamental right to the free exercise of his religion, guaranteed by the Alaska and United States Constitutions. He also claims that the automatic finalization of the AERC's decision violates his due process rights under the Alaska and United States Constitutions.[1]

II. DISCUSSION

A. Swanner Violated AMC 5.20.020 and AS 18.80.240 by Discriminating Based on Marital Status

Swanner argues that he does not discriminate against individuals based on their marital status because he will rent to people who are single, married, widowed, divorced, or separated. However, he will not rent to those

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[1] Each issue involves the interpretation and construction of laws and regulations. On questions of law arising on appeal which do not involve particularized agency expertise, this court is to apply its own independent judgment. *Kodiak Island Borough v. State of Alaska. Dep't of Labor*, 853 P.2d 1111, 1113 (Alaska 1993); *Alaska Transp. Comm'n v. Airpac. Inc.*, 685 P.2d 1248, 1252 (Alaska 1984). Thus, as the superior court found and both parties agree, the substitution of judgment standard is the appropriate standard of review on the issues Swanner has raised.

whom he expects will engage in conduct repugnant to his religious beliefs, namely cohabitation outside of marriage. Swanner considers such cohabitation to be fornication and immoral.

The AERC responds that the laws at issue do not recognize a distinction between "marital status" and "cohabitation." The AERC claims the statutes' plain language demonstrates that "marital status" includes cohabitating couples.

In *Foreman v. Anchorage Equal Rights Comm'n*, 779 P.2d 1199, 1201-03 (Alaska 1989), we looked at the plain language of AS 18.80.240[2] and AMC 5.20.020[3] and reviewed

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[2] Alaska Statute 18.80.240 states:

Unlawful practices in the sale or rental of real property. It is unlawful . . .

> (1) to refuse to sell, lease, or rent the real property to a person because of sex, marital status, changes in marital status,
>
> . . . .
>
> (3) to make a written or oral inquiry or record of the sex, marital status, changes in marital status . . . of a person seeking to buy, lease or rent real property;
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> . . . .
>
> (5) to represent to a person that real property is not available for inspection, sale, rental, or lease when in fact it is so available, or to refuse to allow a person to inspect real property because of the . . . marital status, change in marital status . . . of that person. . . .
>
> . . . .

[3] AMC 5.20.020 provides:

Except in the individual home wherein the renter or lessee would share common living areas with the

the intent behind the anti-discrimination laws. In *Foreman*, a landlord who refused to rent to an unmarried couple argued that the laws did not protect the interests of unmarried couples. *Id.* at 1201. We held that the landlord's policy against renting to unmarried couples unlawfully discriminated on the basis of marital status. *Id.* at 1203. We reasoned that because the landlord would have rented to the prospective tenants had they been married, and he refused to rent the property only after learning the couple was not married, "[t]his constitutes unlawful discrimination based on marital status." *Id.* The same reasoning applies here. Because Swanner would have rented the properties to the couples had they been married, and he refused to rent the property only after he learned they were not, Swanner unlawfully discriminated on the basis of marital status.[4]

> owner, lessor, manager, agent or other person, it is unlawful . . .
>
> A. To refuse to . . . rent the real property to a person because of . . . marital status . . . ;
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> . . .
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> C. To make a written or oral inquiry or record of the . . . marital status . . . of a person seeking to . . . rent real property;
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> . . .
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> E. To represent to a person that real property is not available for inspection . . . [or] rental . . . when in fact it is available, or to refuse a person the right to inspect real property, because of the . . . marital status . . . of that person . . . ;

[4] Swanner agrees that the laws at issue forbid discrimination on the basis of marital status. However, he contends that he did not discriminate against anyone on the basis of his or her marital status. Instead, he asserts that he discriminates on the basis of conduct, which is not prohibited by the statutes.

B. Enforcement of AMC 5.20.020 and AS 18.80.240 Does Not Violate Swanner's Constitutional Right to the Free Exercise of His Religion Under the United States Constitution

Swanner contends that enforcement of AMC 5.20.020 and AS 18.80.240 against him has a coercive effect on the free exercise of his religious beliefs. He believes that compliance with these laws forces him to choose between his religious beliefs and his livelihood. He requests that we accommodate his religious beliefs by creating an exemption to the statute and ordinance. The AERC responds that "it is not Swanner's religious beliefs *per se* which run afoul of our anti-discrimination laws, but rather his actions and conduct in a commercial setting."

The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . . " U.S. Const. amend. I. The Free Exercise Clause applies to the states by its incorporation

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The definition of "cohabit" demonstrates that marital status and conduct are inextricably combined. "Cohabit" means "to live together in a sexual relationship when not legally married." *The American Heritage Dictionary* 259 (1980). Swanner cannot reasonably claim that he does not rent or show property to cohabitating couples based on their conduct (living together outside of marriage) and not their marital status when their marital status (unmarried) is what makes their conduct immoral in his opinion. The undisputed facts demonstrate that Swanner would have rented to the prospective tenants if they were married. Swanner's argument that he discriminated against the prospective tenants based on their conduct and not their marital status is without merit.

into the Fourteenth Amendment. *See Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). It grants absolute protection to freedom of belief and profession of faith, but only limited protection to conduct dictated by religious belief. *See Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872 (1990) (narrowing the scope of religious exemptions under the Free Exercise Clause by upholding a statute that criminalized peyote use, as applied to Native American religious ceremonies).

Swanner claims that we should apply the "compelling state interest" test set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963), to determine whether the laws at issue violate his right to free exercise of religion under the United States Constitution.[5] However, in *Smith*, the United States Supreme Court expressly rejected applying the *Sherbert* test where the law being challenged is generally applicable, or, in other words, where the law is not directed at any particular religious practice or observance.[6] *Smith*, 494 U.S. at 885. "[A] law that is neutral and

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[5] Under this balancing test, a law that incidentally burdens a religious practice must be justified by a compelling governmental interest. *See Sherbert*, 374 U.S. at 403, 406.

[6] The Court stated:

> We conclude today that the sounder approach, and the approach in accord with the vast majority of our precedents, is to hold the test inapplicable to such challenges. The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development." To make an individual's obligation to obey such a law contingent upon the

of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Church of Lukumi Babalu Aye v. City of Hialeah*, 113 S. Ct. 2217, 2226 (1993) (citing *Smith*, 494 U.S. 872 (1990)).[7] "Neutrality and general applicability are interrelated. . . . [F]ailure to satisfy one requirement is a likely indication that the other has not been satisfied. A law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Id.* at 2226.

The first step in determining whether a law is neutral is whether it discriminates on its face. "A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context." *Id.* at 2227. Neither the ordinance nor the statute contain any language singling out any religious group or practice.

> law's coincidence with his religious beliefs, except where the State's interest is "compelling" – permitting him, by virtue of his beliefs, "to become a law unto himself," – contradicts both constitutional tradition and common sense.

494 U.S. at 885 (citations and footnote omitted).

[7] In *Church of Lukumi Babalu Aye v. City of Hialeah*, 113 S. Ct. 2217 (1993), the Court used the Free Exercise Clause to strike down city ordinances that regulated animal sacrifice, but effectively prohibited only sacrifice practices of the Santeria religion. The Court held the ordinances failed to satisfy the *Smith* requirements because they were not neutral, generally applicable, nor narrowly tailored, and did not advance compelling governmental interests.

Even when a law is facially neutral, however, it may not be neutral if it is crafted to impede particular religious conduct. *Id.* These laws clear that hurdle as well. The purpose of AMC 5.20.020 and AS 18.80.240 is to prohibit discrimination in the rental housing market.[8] Swanner does not claim that the purpose of the laws is to discriminate against people based on religion; in fact, he contends that the laws do not even cover this kind of discrimination. Therefore, the laws satisfy the requirement of neutrality.

Additionally, these laws are generally applicable. They apply to all people involved in renting or selling property, and do not specify or imply applicability to a

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[8] AS 18.80.200 states the purpose of the anti-discrimination laws:

> (a) It is determined and declared as a matter of legislative finding that discrimination against an inhabitant of the state because of race, religion, color, national origin, age, sex, physical or mental disability, marital status, changes in marital status, pregnancy or parenthood is a matter of public concern and that this discrimination not only threatens the rights and privileges of the inhabitants of the state but also menaces the institutions of the state and threatens peace, order, health, safety and general welfare of the state and its inhabitants.
>
> (b) Therefore, it is the policy of the state and the purpose of this chapter to eliminate and prevent discrimination in employment, in credit and financing practices, in places of public accommodation, in housing accommodations and in the sale, lease, or rental of real property because of race, religion, color, national origin, sex, age, physical or mental disability, marital status, changes in marital status, pregnancy or parenthood.

particular religious group. Therefore, at least under the general rule, no compelling state interest is necessary.

Smith provides one ground for judicial exemptions from compliance with neutral laws of general applicability. A court may exempt an individual from a law where the facts present a hybrid situation where an additional constitutionally protected right is implicated. *Smith*, 494 U.S. at 881-82. Like the appellant in *Smith*, Swanner does not contend that the laws in question here infringe on any constitutional right other than his right to free exercise of religion. Consequently, this case does not present such a "hybrid" situation.

We conclude that enforcing AMC 5.20.020 and AS 18.80.240 against Swanner does not violate his right to free exercise of religion under the United States Constitution.

C. Enforcement of AMC 5.20.020 and AS 18.80.240 Does Not Violate Swanner's Constitutional Right to the Free Exercise of His Religion Under the Alaska Constitution

Swanner does not dispute that the ordinance and statute are generally applicable and neutral under *Smith*, but asserts that "this decision does not mandate use of a less restrictive standard by state courts in interpreting state constitutional protection."

Swanner is correct in asserting that a state court may provide greater protection to the free exercise of religion under the state constitution than is now provided under the United States Constitution. *See, e.g., Roberts v. State,*

458 P.2d 340, 342 (Alaska 1969) ("We are not bound in expounding the Alaska Constitution's Declaration of Rights by the decisions of the United States Supreme Court, past or future, which expound identical or closely similar provisions of the United States Constitution."). Thus, even though the Free Exercise Clause of the Alaska Constitution is identical to the Free Exercise Clause of the United States Constitution, we are not required to adopt and apply the *Smith* test to religious exemption cases involving the Alaska Constitution merely because the United States Supreme Court adopted that test to determine the applicability of religious exemptions under the United States Constitution.[9] We will apply *Frank v. State*, 604 P.2d 1068 (Alaska 1979), to determine whether the anti-discrimination laws violate Swanner's right to free exercise under the Alaska Constitution.[10]

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[9] Although the *Smith* decision is presently valid in analyzing free exercise challenges under the United States Constitution, legal scholars have criticized the decision. *See* Douglas Laycock, *The Remnants of Free Exercise*, 1990 Sup. Ct. Rev. 1.

In the recently enacted Religious Freedom Restoration Act of 1993, 107 Stat. 1488 (1993), the United States Congress stated that in *Smith*, the "Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion" and that "the compelling interest test in prior Federal court rulings is a workable test."

[10] Swanner notes that two jurisdictions have held that a landlord may refuse to rent to unmarried couples because of his/her religious beliefs. He cites to decisions from Minnesota and California for the proposition that enforcement of the anti-discrimination laws against him violates his right to free exercise. In *Minnesota v. French*, 460 N.W.2d 2 (Minn. 1990), the Minnesota Supreme Court held that a landlord's refusal to rent

In *Frank, v. State,* we adopted the *Sherbert* test to determine whether the Free Exercise Clause of the Alaska

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to an unmarried couple did not violate Minnesota's anti-discrimination laws and enforcing such laws would violate the landlord's free exercise right. However, in *French*, the anti-discrimination laws at issue did not define or otherwise explain the term "marital status." The court concluded that the Minnesota Legislature did not intend to include unmarried couples in the definition. *Cf. Foreman*, 779 P.2d at 1203 (holding unmarried couples are included within the state and municipal prohibitions against discrimination based on marital status). Moreover, the Minnesota court relied on the criminal anti-fornication statute then in effect. In contrast, Alaska's fornication provision was repealed well before the discriminatory conduct giving rise to this case occurred. *Compare French*, 460 N.W.2d at 10, *with Foreman*, 779 P.2d at 1202. Further, the *French* court relied on the Minnesota Constitution, article I, section 16, which contains very different language from the Alaska Constitution. *See French*, 460 N.W.2d at 9.

In *Donahue v. Fair Employment Housing Comm'n*, 2 Cal. Rptr.2d 32 (Cal. App. 1991), *review granted and opinion superseded*, 825 P.2d 766 (Cal. 1992), *dismissed as improvidently granted*, No. S-024538 (Oct. 1, 1993), 859 P.2d 671 (Cal. 1993), the California Court of Appeal held that although the landlords' conduct did constitute prohibited marital status discrimination, the landlords were entitled to an exemption from the anti-discrimination laws because of their religious beliefs. The court based its decision "on independent state constitutional grounds." 2 Cal. Rptr. 2d at 40. However, the California Supreme Court depublished the court of appeal's opinion, thereby rendering the decision uncitable.

Neither case provides this court with meaningful guidance in interpreting the Free Exercise Clause of the Alaska Constitution.

Constitution requires an exemption to a facially neutral law.[11] 604 P.2d at 1070. We held that to invoke a religious exemption, three requirements must be met: (1) a religion is involved, (2) the conduct in question is religiously based, and (3) the claimant is sincere in his/her religious belief. *Id.* at 1071 (citing *Wisconsin v. Yoder*, 406 U.S. 205, 215-16 (1972)). Once these three requirements are met, "[r]eligiously impelled actions can be forbidden only 'where they pose some substantial threat to public safety, peace or order, or where there are competing governmental interests 'of the, highest order and . . . [are] not otherwise served. . . . ' " *Seward Chapel, Inc. v. City of Seward*, 655 P.2d 1293, 1301 n.33 (Alaska 1982) (quoting *Frank*, 604 P.2d at 1070).

Swanner clearly satisfies the first and third requirements to invoke an exception to the laws under the Free Exercise Clause. No one disputes that a religion is involved here (Christianity), or that Swanner is sincere in his religious belief that cohabitation is a sin and by renting to cohabitators, he is facilitating the sin. However, the superior court held that he did not meet the second requirement that his conduct was religiously based because "[n]othing in the record permits a finding that refusing to rent to cohabiting unmarried couples is a religious ritual, ceremony or practice deeply rooted in religious belief." Swanner's claim that the superior court

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[11] In *Seward Chapel, Inc. v. City of Seward*, this court held, "Our ruling in *Frank* establishes that there are situations in which the Alaska Constitution requires the state or a municipality to except from a facially neutral law persons whose religious beliefs dictate that they not comply with the law." 655 P.2d 1293, 1301 (Alaska 1982) (footnote omitted).

misinterpreted *Frank v. State* as limiting free exercise rights only to ritual or ceremony has merit. In *Frank*, we determined that the action at issue was a practice deeply rooted in religion. 604 P.2d at 1072-73. However, we did not intend to limit free exercise rights only to actions rooted in religious rituals, ceremonies, or practices. To meet the second requirement, a party must demonstrate that the conduct in question is religiously based; this determination is not limited to actions resulting from religious rituals. Swanner's refusal to rent to unmarried couples is not without an arguable basis in some tenets of the diverse Christian faith, and therefore, his conduct is sufficiently religiously based to meet our constitutional test. Although Swanner meets the three preliminary requirements to invoke an exception to the anti-discrimination laws, the analysis does not end here.

As discussed previously, a religious exemption will not be granted if the religiously impelled action poses "some substantial threat to public safety, peace or order or where there are competing state interests of the highest order." *Frank*, 604 P.2d at 1070. The question is whether Swanner's conduct poses a threat to public safety, peace or order, or whether the governmental interest in abolishing improper discrimination in housing outweighs Swanner's interest in acting based on his religious beliefs.

In our view, the second part of the test adopted in *Frank* is applicable here. Under this part of the *Frank* test, we must determine whether "a competing state interest of the highest order exists." "The question is whether that interest, or any other, will suffer if an exemption is granted to accommodate the religious practice at issue." *Frank*, 604 P.2d at 1073. The government possesses two

interests here: a "derivative" interest in ensuring access to housing for everyone, and a "transactional" interest in preventing individual acts of discrimination based on irrelevant characteristics. Most free exercise cases, including *Frank*, involve "derivative" state interests. In other words, the State does not object to the particular activity in which the individual would like to engage, but is concerned about some other variable that the activity will affect. This can be contrasted with a "transactional" interest in which the State objects to the specific desired activity itself.

For example, in *Frank*, this court exempted a Central Alaska Athabascan Indian needing moose meat for a funeral potlatch from state hunting regulations. The State did not object to killing moose per se (indeed, it expressly allows moose hunting in season); the State's derivative interest was in maintaining healthy moose populations. In the instant case, the government's derivative interest is in providing access to housing for all. One could argue that if a prospective tenant finds alternative housing after being initially denied because of a landlord's religious beliefs, the government's derivative interest is satisfied. However, the government also possesses a transactional interest in preventing acts of discrimination based on irrelevant characteristics regardless of whether the prospective tenants ultimately find alternative housing.

We look to *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158 (1943), as an analogy. In *Prince*, the United States Supreme Court refused to grant an exemption to child labor laws for children distributing religious literature. As in this case, the state had a transactional interest: preventing exploitation of children in employment. Thus,

the state objected to child labor, the particular activity at issue, per se, not to an effect of that activity. The state legislature had prohibited children from working under certain conditions. Therefore, permitting any child to work under such conditions resulted in harming the government's transactional interest. This transactional government interest does not involve a numerical cutoff below which the harm is insignificant unlike in *Frank*.

Similarly, in the instant case, the legislature and municipal assembly determined that housing discrimination based on irrelevant characteristics should be eliminated. *See Hotel, Motel, Restaurant, Etc. Union Local 879 v. Thomas*, 551 P.2d 942, 945 (Alaska 1976) ("[T]he statutory scheme constitutes a mandate to the agency to seek out and eradicate discrimination in . . . the rental of real property."); *Loomis Electronic Protection, Inc. v. Schaefer*, 549 P.2d 1341, 1343 (Alaska 1976) (recognizing the Alaska Legislature's "strong statement of purpose in enacting AS 18.80, and its avowed determination to protect the civil rights of all Alaska citizens"); *see also* AS 18.80.200; AMC 5.10.010. The existence of this transactional interest distinguishes this case from *Frank* and most other free exercise cases where courts have granted exemptions. The government's transactional interest in preventing discrimination based on irrelevant characteristics directly conflicts with Swanner's refusal to rent to unmarried couples. The government views acts of discrimination as independent social evils even if the prospective tenants ultimately find housing. Allowing housing discrimination that degrades individuals, affronts human dignity, and

limits one's opportunities results in harming the government's transactional interest in preventing such discrimination. Under *Frank*, this interest will clearly "suffer if an exemption is granted to accommodate the religious practice at issue."

The dissent attempts to prove that the state does not view marital status discrimination in housing as a pressing problem by pointing to other areas in which the state itself discriminates based on marital status. However, those areas are easily distinguished. The government's interest here is in specifically eliminating marital status discrimination in housing, rather than eliminating marital status discrimination in general. Therefore, the other policies which allow marital status discrimination are irrelevant in determining whether the government's interest in eliminating marital status discrimination in housing is compelling.

In the examples the dissent cites, treating married couples differently from unmarried couples is arguably necessary to avoid fraudulent availment of benefits available only to spouses. The difficulty of discerning whose bonds are genuine and whose are not may justify requiring official certification of the bonds via a marriage document. That problem is not present in housing cases: as this case demonstrates, if anything, an unmarried couple who wish to live together are at a disadvantage if they claim to be romantically involved.

It is important to note that any burden placed on Swanner's religion by the state and municipal interest in eliminating discrimination in housing falls on his conduct and not his beliefs. Here, the burden on his conduct

affects his commercial activities. In *United States v. Lee*, 455 U.S. 252 (1982), the United States Supreme Court stated the distinction between commercial activity and religious observance:

> When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith, are not to be superimposed on the statutory schemes which are binding on others in that activity.

Id. at 261.

Swanner complains that applying the anti-discrimination laws to his business activities presents him with a "Hobson's choice" – to give up his economic livelihood or act in contradiction to his religious beliefs. A similar argument was advanced in *Seward Chapel*, where Seward Chapel argued that applying the city zoning ordinances to prohibit construction of a parochial school impermissibly burdened the chapel's free exercise rights. 655 P.2d at 1299. We concluded that "there has been no showing of a religious belief which requires members of Seward Chapel to locate in [a specific place]. . . . [T]he inconvenience and economic burden of which Seward Chapel now complains is caused largely by the choice to build in [a specific place] . . . " *Id.* at 1302 (footnote omitted).

Swanner has made no showing of a religious belief which requires that he engage in the property-rental business. Additionally, the economic burden, or "Hobson's choice," of which he complains, is caused by his choice to enter into a commercial activity that is regulated by anti-discrimination laws. Swanner is voluntarily engaging in property management. The law and ordinance regulate

unlawful practices in the rental of real property and provide that those who engage in those activities shall not discriminate on the basis of marital status. *See* AS 18.80.240; AMC 5.20.020. Voluntary commercial activity does not receive the same status accorded to directly religious activity. *Cf. Frank v. State*, 604 P.2d at 1075 (exempting an Athabascan Indian from state hunting regulations "to permit the observance of the ancient traditions of the Athabascans").

"As [James] Madison summarized the point, free exercise should prevail in every case where it does not trespass on private rights or the public peace." Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 Chi. L. Rev. 1109, 1145 (1990) (citation omitted). Because Swanner's religiously impelled actions trespass on the private right of unmarried couples to not be unfairly discriminated against in housing, he cannot be granted an exemption from the housing anti-discrimination laws. Therefore, we conclude that enforcement of AMC 5.20.020 and AS 18.80.240 against Swanner does not violate his right to free exercise of religion under the Alaska Constitution.

D. The AERC Did Not Deprive Swanner of Due Process of Law

1. AMCR 5.10.015(A) is Not an Unconstitutional Delegation by the AERC

Anchorage Municipal Code 5.10.040 authorizes the AERC: (a) to hold public hearings; (b) to administer oaths and issue subpoenas; (h) to delegate to its executive director all powers and duties except the power to hold

hearings and issue orders; and (i) to adopt procedural and evidentiary rules necessary to fulfill the intent of Title 5. AMC 5.10.040. The AERC's power to "adopt procedural and evidentiary rules" is effectuated by promulgating municipal regulations.

Anchorage Municipal Code of Regulations (AMCR) provides the scope of the hearing examiner's recommendation.

> The hearing examiner . . . shall rule on the admissibility of evidence and other procedural matters. On any question which would be determinative of the jurisdiction of the commission or of the culpability of any party, the hearing examiner . . . may only make recommendations to the full commission.

AMCR 5.10.013(C)(2).[12] Additionally, "[a]ll recommendations of the hearing examiner . . . shall be consistent with commission decisions and regulations." AMCR 5.10.013(C)(4).

AMCR 5.10.015(A) states:

> After a party . . . receives the hearing examiner's . . . proposed findings of fact, conclusions of law and proposed order, that person or his/her representative may, within 10 days or such other time fixed by the chair, present written objections to the commission. If no party files an objection within ten days, the proposal shall become final.

[12] On February 16, 1993, the AERC repealed AMCR 5.10.013 and 5.10.015. *See* AMCR 5.60.003(F), 5.60.012(C), (D) for the new regulations replacing these sections.

We apply the regulations as they existed when Swanner's case began at the agency level.

Swanner claims that AMCR 5.10.015(A) directly conflicts with AMCR 5.10.013(C)(2) because "[Section] 5.10.015 appears to permit the commission to adopt the hearing examiner's recommendations without ever considering its content, rationale or rectitude." He interprets AMCR 5.10.013(C)(2) as authorizing only "the full commission" to determine a question which is determinative of jurisdiction or of the culpability of a party; Swanner asserts that his culpability in housing discrimination was at issue. He contends that the AERC abdicated its responsibility by adopting the hearing examiner's recommendation, and, therefore, the AERC violated AMCR 5.10.013.

Swanner is correct that the hearing examiner did not have the authority to determine Swanner's culpability. Instead he had the authority to make a recommendation, which is exactly what he did. Hearing Examiner Landau made a recommendation to the AERC and the AERC decided to adopt it. Therefore, no conflict exists between AMCR 5.10.013(C)(2) and AMCR 5.10.015(A), and the AERC followed its own regulations in adopting the hearing examiner's recommendation.[13]

[13] Where an agency interprets its own regulations, a deferential standard of review properly recognizes that the agency is best able to discern its intent in promulgating the regulation at issue. *Rose v. Commercial Fisheries Entry Comm'n*, 647 P.2d 154, 161 (Alaska 1982) (citing Kenneth C. Davis, *Administrative Law Treatise* § 7.22, at 105-08 (2d ed. 1979)).

2. The Regulations Do Not Require an Independent Review by the AERC

Swanner finds fault with this process and complains that the AERC's regulations do not grant it authority to approve a hearing examiner's decision without conducting an independent review. No rule of procedure provides that the AERC must independently review the hearing examiner's recommendations. AMCR 15.10.015(B) expressly provides for the AERC's review of the hearing examiner's recommendations after a party timely files an objection. Swanner did not file an objection; therefore, the regulations required no independent review by the AERC.

3. Due Process Did Not Require That the AERC Personally Notify Swanner That It Would Adopt the Hearing Examiner's Recommendation Absent an Objection Within Ten Days

Swanner claims the AERC's adoption of the hearing examiner's recommendation violated his constitutional right to due process of law. Both the Alaska and United States Constitutions provide that a person shall not be deprived of "life, liberty, or property, without due process of law." Alaska Const., Art. 1, § 7; U.S. Const. amend. XIV, § 1. "Due process requires 'that deprivation of life, liberty or property by adjudication be proceeded by notice . . . appropriate to the nature of the case.' " *Wickersham v. State Com. Fisheries Entry Comm'n*, 680 P.2d 1135, 1144 (Alaska 1984) (quoting *Mullane v. Central Hanover Bank and Trust Co.*, 229 U.S. 306, 313 (1950)). This court held "[a]n elementary and fundamental requirement of

due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action." *Aguchak v. Montgomery Ward Co., Inc.*, 520 P.2d 1352, 1356 (Alaska 1974) (adopting *Mullane* language for analysis under the Alaska Constitution).

Swanner states that he did not receive notice that his failure to object to the hearing examiner's recommended decision would result in the AERC making the decision final. He claims that he became aware of the AERC's intent to approve the hearing examiner's recommended decision the day after objections to the proposed order were due, when the AERC issued a memorandum stating the proposed order became final. Therefore, he claims he was not given "notice reasonably calculated, under all the circumstances, to apprise [him] of the pendency of the action, as required by Alaska law."

Swanner cannot claim that he was unaware of the pendency of this action. The actual hearing in this matter occurred on October 9 and 11, 1990, and Swanner participated in seven months of formal pre-hearing procedures and discovery. Swanner was clearly aware of the "pendency of this action." Moreover, AMCR 5.10.015 was readily available to Swanner and the public from both the AERC and the State Law Library. Accordingly, the AERC did not deny Swanner due process.

III. CONCLUSION

We hold that Swanner impermissibly discriminated against Bowles, Harper, and Moose because he would not rent to them based on their marital status. The Free

Exercise Clause of the United States and Alaska Constitutions do not permit Swanner to disobey the state and municipal anti-discrimination laws by entitling him to an exemption. The AERC did not deny Swanner his right to due process by following its procedural regulations.

The AERC's final order and the superior court's opinion are AFFIRMED.

MOORE, Chief Justice, dissenting.

Article I, section 4 of the Alaska Constitution declares that "[n]o law shall be made respecting an establishment of religion, or prohibiting the free exercise thereof." As the majority correctly recognizes, this provision may provide greater protection of free exercise rights than is now provided under the United States Constitution. Opinion at 12-13. Accordingly, while the United States Supreme Court has adopted a new test to analyze free exercise claims such as the one at issue here,[1] the majority agrees that we will continue to apply the compelling interest test in interpreting the free exercise clause of the Alaska Constitution. Opinion at 13.

Our decision in *Frank v. State*, 604 P.2d 1068 (Alaska 1979), sets forth the framework from which we must determine whether AMC 5.20.020 and AS 18.80.240 violate Swanner's right to the free exercise of his religion. As we stated in *Frank*, "[n]o value has a higher place in our

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[1] *See Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872, 884-90 (1990).

constitutional system of government than that of religious freedom." 604 P.2d at 1070. For this reason, a facially neutral statute or ordinance which interferes with religious-based conduct must be justified by a compelling state interest. *Id.* Absent such an interest, our constitution requires an exemption from the laws at issue to accommodate religious practices. *Id.* at 1070-71.

The majority acknowledges that Swanner's actions fall within the ambit of the free exercise clause. Swanner has shown that his refusal to rent apartments to unmarried individuals who plan to live with a member of the opposite sex is based on his Christian faith, which strictly proscribes such cohabitation. No one questions the sincerity of his religious belief that he facilitates a sin by renting to unmarried individuals such as the complainants in this case. *See* Opinion at 15-16. For this reason, Swanner's religiously impelled conduct must be protected under Alaska law unless the AERC can show that the conduct poses "some substantial threat to public safety, peace or order," or that there exist competing governmental interests "of the highest order" which are not otherwise served without limiting Swanner's conduct. *Frank*, 604 P.2d at 1070 (citing *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) and *Sherbert v. Verner*, 374 U.S. 398, 403 (1963)); *Seward Chapel, Inc. v. City of Seward*, 655 P.2d 1293, 1301 n.33 (Alaska 1982). I do not believe the AERC has met its burden in this case. I would therefore grant Swanner an exemption to accommodate his religious beliefs.

First, I note that in determining that the governmental interest in this case is "of the highest order," the majority announces an entirely new and unnecessary test

examining the state's "transactional" and "derivative" interests. Opinion at 16-17. Under this analysis, the majority concludes that the state has a transactional, or *per se*, interest in preventing "individual acts of discrimination based on irrelevant characteristics" which overrides Swanner's free exercise rights in this case. Because the interest is "transactional," the majority concludes that no evidentiary basis is required to show that rental housing for unmarried couples has become scarce. However, before the court would enforce the state's "derivative" interest in "ensuring access to housing for everyone," the AERC apparently would have to make an evidentiary showing that cohabitating couples have experienced hardship in finding available housing, *i.e.*, that Swanner's conduct poses a "substantial threat to public safety, peace or order." *Frank*, 604 P.2d at 1070.

In my opinion, this amorphous analysis of the state's interests ultimately will prove to be useless in resolving future free exercise cases. Even in this case, I do not believe it provides a useful distinction of the interests at issue. For example, the majority determines that the state has a *per se* objection to marital status discrimination in housing which overcomes Swanner's free exercise rights. The majority defines this interest as that in "preventing acts of discrimination based on irrelevant characteristics." Opinion at 17. Such an articulation of the state's interest poses myriad questions. Who is to determine what is an "irrelevant" characteristic? Obviously, marital status is not "irrelevant" to Swanner. It is central to the question whether he will be committing a sin under the dictates of his religion. Is the legislative branch the final arbiter of relevancy or irrelevancy? Further, the discrimination at

issue here is not based on innate "characteristics" but rather on the *conduct* of potential tenants. While this conduct is worthy of some protection, it does not warrant the same constitutional protection given to religiously compelled conduct. I am not willing to place the right to cohabitate on the same constitutional level as the right to freedom from discrimination based on either innate characteristics – such as race or gender – or constitutionally protected belief, such as freedom of religion.

In addition, it remains unclear to me how the state's "derivative" interests are to be identified. Here, that interest is defined with little explanation as being the state's interest in "providing access to housing for all." Opinion at 17. Does this mean the state has no *per se* objection to the fact that some individuals may have limited access to housing? In *Frank*, could it not be said that the state had a *per se* interest in enforcing its hunting regulations?

In *Frank*, this court set forth a workable and sufficient guide to determine whether a governmental interest is sufficiently compelling to overcome an individual's free exercise rights. 604 P.2d at 1070. It seems to me that the majority's effort to expand this analysis adds little to the actual analysis of interests at stake. To the contrary, I see the majority's expansion of *Frank* as little more than a strained effort to distinguish *Frank* from the present situation when such a distinction is not logically justified. In this effort, the majority totally ignores the record in this case, and it engages in a game where the "transactional" or "derivative" label attached to any given state interest predetermines the outcome of the case.

There is no governmental interest "of the highest order" to justify the burden on Swanner's fundamental rights.

Even applying the framework announced by the court in analyzing whether the state's interest is "of the highest order," I cannot agree with the court's reasoning and resulting decision. In essence, the majority's conclusion is that marital status discrimination constitutes such an affront to human dignity that the state has a *per se* obligation "of the highest order" to prevent it. Based on my analysis of free exercise jurisprudence and the issues surrounding marital status discrimination, I cannot conclude that eradication of marital status discrimination in the rental housing industry constitutes a governmental interest of such high order as to justify burdening Swanner's fundamental constitutional rights.[2]

There can be no question that the state has a compelling interest in eradicating discrimination against certain

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[2] Significantly, the majority cites no cases to support the proposition that the state has a compelling interest in eradicating marital status discrimination, particularly when the discrimination at issue must be balanced against interests of constitutional magnitude. Both *Loomis Elec. Protection, Inc. v. Schaefer*, 549 P.2d 1341 (Alaska 1976), and *Hotel, Motel, Restaurant, Constr. Camp Employees and Bartenders Union Local 879 v. Thomas*, 551 P.2d 942 (Alaska 1976), cite the general purpose statement of AS 18.80.200; however, neither case does so to establish the existence of a compelling state interest. Both cases involved gender discrimination, the eradication of which has been held to be a compelling interest, as I discuss *infra*. Neither case is applicable to the instant case, where marital status discrimination is involved and where the discriminating party is asserting a core constitutional freedom.

historically disadvantaged groups. *See, e.g., Bob Jones University v. United States*, 461 U.S. 574, 593-95 (1983) (racial discrimination); *Roberts v. United States Jaycees*, 468 U.S. 609, 625 (1984) (gender discrimination). This compelling interest has been found to exist based on a determination that the discrimination at issue is so invidious to personal dignity and to our concept of fair treatment as to warrant strict protection. There is no question that Swanner's right to freely exercise his religion could and should be burdened if he engaged in such discrimination as a result of his religious beliefs.

This fact does not mean, however, that *every* form of discrimination is equally invidious or that the state's interest in preventing it necessarily outweighs fundamental constitutional rights. Rather, the cases which have upheld an imposition on free exercise have articulated certain specific reasons that some forms of discrimination are of particular governmental interest and deserving of heightened judicial scrutiny. In *Bob Jones University v. United States*, 461 U.S. 574 (1983), for example, the Supreme Court refused to grant tax-exempt status to schools that maintained racially discriminatory policies under their interpretation of the Bible. In doing so, the Court discussed this nation's long history of officially sanctioned racial segregation and discrimination in education. It further noted that, since the late 1950s, every pronouncement of the Supreme Court and myriad Acts of Congress and Executive Orders attested to a national policy prohibiting such discrimination. *Id.* at 594-95, 604. It therefore concluded that "[t]here can no longer be any doubt that racial discrimination in education violates deeply and widely accepted views of elementary justice."

Id. at 592. Accordingly, the government's interest in eradicating racial discrimination in education was found to be compelling.

Similarly, in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), the Supreme Court declared that the state's compelling interest in eradicating discrimination against its female citizens justified any minimal interference with an all-male organization's freedom of expressional association. In analyzing the weight of the state's interest, the Court discussed the invidious nature of gender bias, stating:

> [D]iscrimination based on archaic and overbroad assumptions about the relative needs and capacities of the sexes forces individuals to labor under stereotypical notions that often bear no relationship to their actual abilities. It thereby both deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life.

Id. at 625 (citations omitted). The Court also observed that society generally had recognized the importance of removing "the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups, including women." *Id.* at 626. Based on these conclusions, it was no stretch to find that the state possessed a compelling interest in eradicating gender discrimination, and that this interest was sufficient to overcome the Jaycees' First Amendment claim. *Id.* at 626-29.

The majority today avoids engaging in any similar analysis of marital status discrimination to explain why

or how it is so damaging to human dignity to become of such governmental import as to overcome a fundamental constitutional right.[3] This analysis is critical. The majority cites no evidence that marital status classifications have been associated with a history of unfair treatment that would warrant heightened governmental protection.[4] To the contrary, I believe the law is clear that marital status classifications have been accorded relatively low import

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[3] While the majority contends that its decision today affects only Swanner's conduct, not his religious beliefs, Opinion at 19-20, I do not believe that the Alaska Constitution distinguishes so clearly between religious belief and religious conduct. *See Frank*, 604 P.2d at 1070 (because of the close relationship between conduct and belief, and because of the high value we assign to religious beliefs, religiously impelled actions can be forbidden only where they are outweighed by a compelling governmental interest). *See also Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972) ("[B]elief and action cannot be neatly confined in logic-tight compartments."); *Smith*, 494 U.S. at 893 (O'Connor, J., concurring) ("Because the First Amendment does not distinguish between religious belief and religious conduct, conduct motivated by sincere religious belief, like the belief itself, must therefore be at least presumptively protected by the Free Exercise Clause."). I would hold that conduct that is motivated by sincere religious belief is presumptively protected by Article I, section 4.

[4] The majority pronounces that "the government views acts of discrimination as independent social evils. . . . " Opinion at 18. This analysis ignores the specific issue here: discrimination in housing based on *marital status*. Had Swanner's religious beliefs compelled him to discriminate based on characteristics such as race or gender, I clearly would vote to deny an exemption. However, I am not convinced that marital status discrimination is or should be treated as comparable in any way to race or gender discrimination.

on the scale of interests deserving governmental protection. For instance, the government itself discriminates based on marital status in numerous regards, and there is no suggestion that this practice should be reexamined. Alaska law explicitly sanctions such discrimination. *See, e.g.*, AS 13.11.015 (intestate succession does not benefit unmarried partner of decedent); AS 23.30.215(a) (workers' compensation death benefits only for surviving spouse, child, parent, grandchild, or sibling); Alaska R. Evid. 505 (no marital communication privilege between unmarried couples); *Serradell v. Hartford Accident & Indemn. Co.*, 843 P.2d 639, 641 (Alaska 1992) (no insurance coverage for unmarried partner under family accident insurance policy).

In addition, marital status classifications have never been accorded any heightened scrutiny under the Equal Protection Clause of either the federal or the Alaska Constitutions. Disparate treatment of individuals based on classifications such as race, on the other hand, are reviewed under the highest scrutiny. *See, e.g., Korematsu v. United States*, 323 U.S. 214 (1944) (restrictions curtailing the civil rights of a single racial group are immediately suspect and deserve strict scrutiny analysis). Gender-based classifications are similarly analyzed under a heightened level of scrutiny at the federal level. *See, e.g., Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150 (1980) (gender-based discrimination must serve important governmental objectives and the discriminatory means employed must be substantially related to the achievement of those objectives). The sliding scale approach to equal protection analysis under the Alaska Constitution similarly applies a heightened level of scrutiny to laws

burdening racial minorities or other suspect classifications. *See State v. Ostrosky*, 667 P.2d 1184, 1193 (Alaska 1983) ("[L]aws which embody classification schemes that are more constitutionally suspect, such as laws discriminating against racial or ethnic minorities, are more strictly scrutinized."); *State v. Erickson*, 574 P.2d 1, 11-12 (Alaska 1978) (where fundamental rights or suspect categories are involved, equal protection analysis under the Alaska Constitution requires a compelling state interest).

At the federal level, the eradication of marital status discrimination in the housing context clearly has not been treated as a compelling interest.[5] Neither the Federal Fair Housing Act, 42 U.S.C. § 3604 (1988), nor the Federal Civil Rights Act, 42 U.S.C. §§ 1981 and 1982 (1988), would prohibit the precise form of marital status discrimination at issue here, unless it was being used as a pretext for a more egregious form of discrimination, such as that based on race. *See Marable v. H. Walker & Assocs.*, 644 F.2d 390, 397 (5th Cir. 1981) (finding a violation of the fair housing and civil rights statutes only after concluding that, although the landlord asserted that he refused to rent housing based on the applicant's marital status, this excuse was a mere pretext for racial discrimination); *see also* James A. Kushner, *The Fair Housing Amendments Act of 1988: The Second Generation of Fair Housing*, 42 Vand. L.

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[5] While I recognize that Alaska's antidiscrimination legislation is not substantially similar to comparable federal laws – *see, e.g., Hotel, Motel, Restaurant, Constr. Camp Employees and Bartenders Union Local 879 v. Thomas*, 551 P.2d 942, 945 (Alaska 1976) – the majority's failure to cite any authority for a compelling interest at the state level in this case leads me to make this comparison for further guidance.

Rev. 1049, 1106 (1989) (the Fair Housing Act does not protect unmarried couples from a landlord's refusal to rent unless a case can be made that the marital status discrimination is merely a pretext for racial, ethnic, religious or gender-based discrimination).

My research has not revealed a single instance in which the government's interest in eliminating marital status discrimination has been accorded substantial weight when balanced against other state interests, let alone fundamental constitutional rights. I find nothing to suggest that marital status discrimination is so invidious as to outweigh the fundamental right to free exercise of religion.

The majority comments that its result today is justified because Swanner's right to the free exercise of his religious beliefs must be accorded less weight since he has entered the commercial arena. Opinion at 19-21. As discussed above, it is well-accepted that an individual's right to religious freedom will not and cannot always override other interests. *See, e.g., United States v. Lee*, 455 U.S. 252, 261 (1982) (rejecting Amish employer's claim that imposition of social security taxes violated his free exercise rights). However, neither Lee nor any other case of which I am aware stands for the proposition that individuals like Swanner altogether waive their constitutional right to the free exercise of religion simply because a conflict between their religious faith and some legislation occurs in a commercial context. To the contrary, the *Lee* Court recognized that, even in a commercial setting, the state must justify its limitation on religious liberty by showing the limitation is "essential to accomplish an

overriding governmental interest." *Id.* at 257-58. The AERC has simply failed to meet that burden here.

The majority suggests that Swanner's constitutional rights must be accorded lesser weight because he *voluntarily* engages in the property management industry, and his right to engage in that business is not entitled to judicial protection. Opinion at 20-21. However, this court has stated that "the right to engage in an economic endeavor within a particular industry is an 'important' right for state equal protection purposes." *State v. Enserch Alaska Constr., Inc.*, 787 P.2d 624, 632 (Alaska 1989) (citing *Commercial Fisheries Entry Comm'n v. Apokedak*, 606 P.2d 1255, 1266 (Alaska 1980)). The ability to participate in a particular industry, such as rental property management, is therefore entitled to more protection under our state constitution than the majority acknowledges.

The majority incorrectly relies on *Seward Chapel* to arrive at its contrary conclusion. Unlike the present case, *Seward Chapel* did not involve a forced decision between giving up one's livelihood or violating one's religious beliefs. In *Seward Chapel*, we merely found that no religious belief required an exception to city zoning laws prohibiting the location of a parochial school on a specific site. 655 P.2d at 1302. No activity was totally prohibited; only the place in which it could be conducted was being regulated. I believe that there is a significant difference between the inconvenience placed upon Seward Chapel and the total abrogation of Mr. Swanner's right to earn a living in his chosen profession while abiding by his sincerely held religious beliefs.

There is no basis in the record to conclude that an exemption in this case would create a substantial threat of harm.

In *Frank*, this court required that the state establish precisely how its interest would suffer if an exemption was granted to accommodate the religious conduct at issue. 604 P.2d at 1073. Thus, even accepting that the government has a strong interest in assuring available housing, the AERC must show how this interest will suffer in real terms if an exemption is granted to Swanner.

I see no evidence whatsoever in the record to suggest that Swanner's conduct poses a substantial threat to public safety, peace or order such that the burden on Swanner's rights is justified. For this reason, I fail to see why an exemption to accommodate Swanner's religious beliefs is not warranted. Mere speculation that housing for unmarried couples may become scarce if an exemption is granted is insufficient to establish a compelling governmental interest. In *Frank*, we specifically criticized the state for speculating, without any supporting data, that an exemption to moose hunting regulations for an Athabascan funeral potlatch would open the flood gates to widespread poaching. *Id.* at 1074. We stated: " 'Justifications founded only on fear and apprehension are insufficient to overcome rights asserted under the First Amendment.' " *Id.* (quoting *Teterud v. Burns*, 522 F.2d 357, 361-62 (8th Cir. 1975)). We further found that, since the state had not presented any evidence that so many moose would be taken for funeral potlatch ceremonies as to jeopardize appropriate population levels, it had not met

its burden to justify curtailing the religious practice at issue. *Id.*[6]

As in *Frank*, the record here is completely devoid of any evidence to suggest that there are so many landlords or property managers in Anchorage whose religious beliefs are identical to Swanner's as to constitute a substantial threat to available housing. In a city the size of Anchorage, it is difficult to conclude based on intuition alone that housing availability for unmarried couples will become so scarce as to constitute a substantial threat to community welfare. If there were some persuasive evidence to support such a conclusion, I may well have arrived at a different conclusion today.

Conclusion

I believe Swanner has been presented with a Hobson's choice of either complying with the law or abandoning the precepts of his religion. Since the government's interest in

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[6] Our requirement of evidentiary support for the state's refusal to grant an exemption is well-supported by United States Supreme Court precedent. *See Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 719 (1981) (rejecting state's asserted reasons for refusing a religious exemption due to lack of evidence in the record); *Wisconsin v. Yoder*, 406 U.S. 205, 224-29 (1972) (rejecting state's argument concerning the dangers of a religious exemption as speculative and unsupported by the record); *Sherbert v. Verner*, 374 U.S. 398, 407 (1963) ("[T]here is no proof whatever to warrant such fears . . . as those which the [state] now advance[s]."); *see also Smith*, 494 U.S. at 911 (Blackmun, J., dissenting) (state's assertion that religious exemption for peyote use would harm health and safety of state citizens is unsupported and speculative).

this particular law does not outweigh Swanner's fundamental religious rights, Swanner should be granted an exemption to accommodate his beliefs. The AERC relies on nothing more than a pure conclusion that the state has a compelling interest in preventing marital status discrimination in housing. It has not presented any evidence that an exemption in this case would result in a substantial threat to housing availability. Nor does it explain exactly what is so invidious about marital status discrimination as to make its proscription a governmental interest of the highest order, comparable with the state's interest in eradicating racial or gender discrimination. For these reasons, I fail to see how a limited exemption for Swanner and others similarly situated is not justified. In my opinion, the analysis and result set forth in this case will return to haunt this court in future decisions.

APPENDIX C

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

TOM SWANNER, d/b/a WHITEHALL PROPERTIES,	)
Appellant,	)
vs.	)
ANCHORAGE EQUAL RIGHTS COMMISSION, PAUL L. CONNERTY, EXECUTIVE DIRECTOR, ex. rel.	)
Appellees,	)

Case No. 3AN 91-1898 CI

DECISION AND ORDER

This is an appeal from a decision by the Anchorage Equal Rights Commission. Bowles, Harper and Moose filed complaints with the Anchorage Equal Rights Commission alleging that Whitehall Properties had discriminated against them based upon their marital status. Whitehall Properties is an unincorporated business owned by Tom Swanner. Complainants alleged that Swanner had refused to either rent or permit them to inspect residential property under his management. Each complainant was part of an unmarried couple and intended to reside on the premises with his/her fiance or partner. Once he learned of their intentions, either by inquiry or otherwise, Swanner advised each complainant that he specifically refused to show or rent the properties to them because his religious principles prohibited him

from renting to unmarried people who would co-habit together.

The issues presented in this appeal require the interpretation and construction of laws and regulations and questions of law which do not deal with areas of special agency expertise. Therefore, the applicable standard of review is substitution of judgment. *Earth Resources Co. v. State, Department of Revenue*, 665 P2d 960, 965 (Alaska 1983).

The first issue on appeal is whether the agency erred in finding that Swanner discriminated against appellees on the basis of marital status in violation of AMC 5.20.020 and AS 18.80.240. In a case directly on point, *Foreman v. AERC*, 779 P2d 1199 (Alaska 1989), the Alaska Supreme Court held that a landlord's refusal to rent an apartment to an unmarried, cohabiting man and woman constituted unlawful discrimination based on marital status in violation of AS 18.80.240(2) and AMC 05.20.020. There is no error with regard to this issue.

The second issue on appeal is whether the agency erred in concluding that neither AMC 5.20.020 nor AS 18.80.240 violates Swanner's constitutional right to the free exercise of religion under the United States constitution. Appellant contends that the statutes and ordinances must fail unless the government has a compelling governmental interest or can demonstrate that his conduct is a threat to public safety, peace or order.

In *Employment Div, Dept. of Human Res. v Smith*, 494 U.S. 872, 110 S. Ct. 1595, 108 L.Ed. 876 (1990), the United States Supreme Court directly addressed the issue of free exercise of religion as it relates to acts in violation of state

or local law. In *Smith* the court specifically limited the balancing test urged by appellant to the subject matter of the cases in which they developed – unemployment compensation eligibility rules. Further, the court distinguished between religious belief, which is absolutely protected, and acts or abstentions engaged in for religious reasons. The court held that the right of free exercise of religion does not relieve an individual of the obligation to comply with a valid or neutral law of general applicability on the ground that the law proscribes or requires conduct that is contrary to his religious beliefs as long as no other constitutionally protected rights, such as free speech, are violated. *Smith*. 111 S.Ct. at 1600-1602.

In this case, both parties agree that the laws from which appellant seeks to exempt himself are neutral laws of general applicability. Appellant makes no argument that the law is one intended to interfere with acts "only when they are engaged in for religious reasons, or only because of the religious belief that they display." *Smith*, 111 S.Ct at 1599. On the contrary, appellant argues only that failure to exempt Swanner would be an "undue burden" on the free exercise of his religion. Brief of Appellant at 22.

The state and municipal laws at issue in this case are set forth at AS 18.80.200 and AMC 5.10.010.[1] The purpose

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[1] AMC 5.20.02 prohibits any person having the right to sell, lease, rent or advertise real property from refusing to do so because of marital status; to make inquiry or record of the marital status of a person seeking to buy, lease or rent real property; or to represent to such a person that the real property is not available when it is available or to refuse the right to

of these provisions is to prohibit discrimination in the rental housing market. There is no showing that these statutes/ordinances are aimed at conduct which is engaged in for religious reasons or because of the religious belief that such conduct displays. Therefore, under *Smith*, AS 18.80.200 and AMC 5.10.010 are valid neutral laws of general applicability.

Once the ordinance and statute in question are found to be valid neutral laws of general applicability, *Smith* enunciates only one ground for exemption from compliance. An exemption may be made where the facts present a hybrid situation where some additional constitutionally protected right is also implicated. *Smith* 494 U.S. at 881-82 Like the appellant in *Smith*, Swanner does not contend that the laws in question here any constitutional right other than his right to free exercise of religion. Consequently, this case does not present such a hybrid situation. Therefore, enforcement of AS 18.80.200 and AMC 5.10.010 against Swanner does not violate his right to free exercise of religion under the United States constitution. The agency's decision must be affirmed on this issue.

The next issue is whether the agency erred in concluding that enforcement of AMC 5.20.020 and AS 18.80.240 does not violate Swanner's Alaska constitutional right to the free exercise of religion. The controlling case in interpreting the Free Exercise clause of the Alaska constitution is *Frank v. State*, 604 P2d 1068 (Alaska, 1979).

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inspect real property because of the marital status of the person inquiring or any person associated with the inquiring person. AS 18.20.240 prohibits the same conduct.

In *Seward Chapel Inc. v. City of Seward*, 655 P2d 1293, 1300 (Alaska 1982), the court held, "Our ruling in *Frank* establishes that there are situations in which the Alaska Constitution requires the state or a municipality to except from a facially neutral law persons whose religious beliefs dictate that they not comply with the law." Therefore, this court will apply the test as enunciated in *Frank* and applied in *Seward Chapel*. Under that test, religiously impelled actions can be forbidden only where they pose some substantial threat to public safety, peace or order, or where there are competing governmental interests that are of the highest order and are not otherwise served.

A three-prong test is applied to determine whether the free exercise clause may be invoked to require an exception to a law: 1) the conduct in question is religiously based, 2) claimants are sincere in their religious belief, and 3) the forbidden practice is deeply rooted in religious belief. Once the three threshold requirements are met, the state has the burden of demonstrating a compelling state interest to justify curtailing a religious conduct in question. *Frank v. State*, 604 P2d 1068.

Appellee concedes that the conduct is religiously based and that Appellant is sincere in his religious belief. The remaining question then, is whether the act of refusing to rent properties to cohabiting, unmarried couples is a practice deeply rooted in Appellant's religious belief. A review of the cases previously decided which found protected religious practices reveals that each of those cases concerned participation in religious ceremonies, worship, or educational activities. See *Frank; Seward Chapel; Sherbert v. Verner* 374 U.S. .398 (1963). In *U.S. v. Lee*, 445 U.S. 252 (1982) the U.S. Supreme Court succinctly stated the

distinction between commercial activity and religious observance:

> When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity.

Nothing in the record permits a finding that refusing to rent to cohabiting unmarried couples is a religious ritual, ceremony or practice deeply rooted in religious belief. Therefore, the conduct is not protected religious conduct and Appellant is not entitled to an exception from the enforcement of AS 18.80.200 and AMC 5.10.010. The agency must be affirmed as to this issue.

The next issue on appeal is whether the automatic finalization of the hearing officer's recommendations violates municipal ordinances. AMCR 5.10.015, promulgated under AMC 5.10.040(I) provides that

> After a party . . . receives the hearing examiner's proposed findings . . . that person or his/her representative may, within ten days or such other time fixed by the chair, present written objections to the commission. If no party files an objection within 10 days, the proposal shall become final.

Thus, the automatic finalization of the recommended decision was in accordance with the relevant agency regulations. There is no error as to this issue.

The final issue on appeal is whether the automatic finalization of the hearing officer's recommended decision violated Swanner's due process rights. Appellant

argues that he was deprived of due process because he did not receive notice that his failure to object to the recommended decision would result in the decision becoming final. A proceeding which is to be accorded finality must include "notice reasonably calculated, under all the circumstances to apprise interested parties of the pendency of the action." *Aguchak v. Montgomery Ward Co.*, 520 P2d 1352, 1365 (Alaska, 1974). Swanner was represented by counsel in the action below and does not make any showing that the regulation quoted above was not available to him. Further, Swanner's participation in the hearing and in seven months of pre-hearing procedures and discovery show that he had actual notice of the pendency of the action. Appellant's due process rights were not violated.

The decision of the Anchorage Equal Rights Commission is AFFIRMED.

DATED at Anchorage, Alaska, this 31st day of August, 1992.

/s/ Karen L. Hunt
Karen L. Hunt
Superior Court Judge

APPENDIX D

BEFORE THE ANCHORAGE EQUAL RIGHTS COMMISSION

ANCHORAGE EQUAL RIGHTS COMMISSION, PAUL L. CONNERTY, EXECUTIVE DIRECTOR, ex rel. JOSEPH BOWLES, WILLIAM F. HARPER, and DEE MOOSE, Complainants, vs. TOM SWANNER d/b/a WHITEHALL PROPERTIES, and BRUCE A. and KATHRYN L. KNIEGGE, Respondents.	AERC Hearing Nos. 90-0115-002-CF-PH 90-0115-003-CF-PH 90-0419-053-CF-PH

NOTICE OF FINAL ORDER

The Hearing Examiner's Recommended Decision in the above-referenced cases was received on January 8, 1991. Since no further action was timely taken by any parties, the proposed Order became final on January 22, 1991, pursuant to the Administrative Rules of Procedure § 5.10.015.

DATED at Anchorage, Alaska this 31st day of January , 1991.

/s/ Cheri C. Jacobus
CHERI C. JACOBUS, CHAIR
ANCHORAGE EQUAL
RIGHTS COMMISSION

BEFORE THE ANCHORAGE EQUAL RIGHTS COMMISSION

ANCHORAGE EQUAL RIGHTS COMMISSION, PAUL L. CONNERTY, EXECUTIVE DIRECTOR, ex rel. JOSEPH BOWLES, WILLIAM F. HARPER, and DEE MOOSE, Complainants, vs. TOM SWANNER d/b/a WHITEHALL PROPERTIES, and BRUCE A. and KATHRYN L. KNIEGGE, Respondents.	AERC Hearing Nos. 90-0115-002-CF-PH 90-0115-003-CF-PH 90-0419-053-CF-PH

HEARING EXAMINER'S RECOMMENDED DECISION

INTRODUCTION

This matter involves three separate complaints of marital status discrimination in the rental of real property in Anchorage.

Joseph Bowles, William F. Harper, and Dee Moose allege that Tom Swanner, doing business as Whitehall Properties (hereinafter "Swanner" or "Whitehall Properties"), discriminated against them in violation of AMC 5.20.020 and AS 18.80.240 by refusing to rent or allow inspection of residential properties upon learning that each complainant intended to live on the property with a member of the opposite sex to whom he or she was not married. The complaint of Joseph Bowles was also filed against Bruce A. and Kathryn L. Kniegge as the owners of a residential property managed by Swanner that Bowles wished to rent.

In response to the complaints, Swanner denies that he discriminated against complainants on the basis of marital status in violation of AMC 5.20.020 or AS 18.80.240. Additionally, Swanner contends that enforcement of these provisions against him would violate his constitutional rights to the free exercise of his religion. Respondents Bruce A. and Kathryn L. Kniegge did not file any responsive pleadings to the complaint against them.

A public hearing was held before Hearing Examiner Robert W. Landau on October 9 and 11, 1990. The case in support of the complainants was presented by Beth Behner, Staff Attorney for the Anchorage Equal Rights

Commission (AERC). Respondent Swanner was represented by Stephen S. DeLisio, of Staley, DeLisio, Cook and Sherry, Inc. Respondents Bruce A. and Kathryn L. Kniegge did not appear at the hearing and were not represented by counsel.

The parties at the hearing presented evidence in the form of witness testimony and documentary exhibits. Post-hearing briefs were also submitted after completion of the hearing transcript. Upon consideration of the evidence and arguments of the parties, the Hearing Examiner submits the following recommended findings of fact, conclusions of law and proposed order.

FINDINGS OF FACT

1. Whitehall Properties is an unincorporated real estate company in Anchorage owned and managed by Tom Swanner. Swanner is a licensed real estate broker, and his company specializes in the management and rental of residential property. R. 157, 162. Whitehall Properties is not organized as a religious or charitable organization. R. 268.

2. In April 1989, Joseph Bowles wanted to find a new place to live. At that time he was single but was engaged to be married and was living with his fiancee. R. 27. He drove by a duplex on Clear Haven and noticed a "For Rent" sign with a telephone number. R. 28. When he called the telephone number, it was answered by a woman named "Joan" at Whiteball Properties. R. 36. Subsequent testimony revealed that the woman probably was Joanne Swanner, who worked in her husband's real estate office. R. 270.

3. After obtaining information about the rental property, Bowles indicated he would have to discuss the matter with his fiancee. R. 36-37. At that point Joanne Swanner told him that the company had a policy of not renting to cohabiting couples for religious reasons. R. 37. Bowles then spoke to another individual at Whitehall Properties – in all likelihood Tom Swanner – who confirmed the company's policy of not renting to unmarried couples that intended to live together, and refused to permit Bowles and his fiancee to inspect the property for rent. R. 37-38.

4. Bowles subsequently filed a discrimination complaint with the AERC. Exhibits B-1 and B-2. He went back to the property for rent and verified that the street address was 8000 E. Clear Haven Circle. R. 29, 35-36; Exhibit B-2. According to municipal tax records, that property is owned by Bruce A. and Kathryn L. Kniegge. R. 31; Exhibit B-3. The property was being managed for the Kniegges by Whitehall Properties. R. 333. Bowles was told the monthly rent for the unit was $900. R. 47.

5. After Bowles was rejected as a tenant by Whitehall Properties, he and his fiancee contained to live in their old apartment for an additional 30 days. R. 47. Subsequently they found other suitable rental housing in the same part of town for $1,100 a month. R. 47; Exhibit B-5. Bowles and his fiancee lived at the new location for five months but, finding it too expensive, moved to Eagle River. R. 49-50.

6. During the summer of 1989, complainant William F. Harper was also searching for housing in Anchorage. Like Joseph Bowles, Harper was single but was engaged

to be married. R. 203-07. Harper contacted Whitehall Properties and arranged to inspect an available rental unit. R. 203-04. After looking at the unit, Harper and his fiancee returned to the Whitehall office to inquire about other available rentals. They spoke to Tom Swanner, who asked if they were married. Upon learning they were not married, Swanner declined to show them any other rental properties. R. 126, 205.

7. After being rejected by Whitehall Properties, Harper and his fiancee continued their search for housing and eventually found another place to live. Until they found suitable alternative housing, they stayed in their previous apartment for approximately five additional days at a cost of $50 per day. R. 128, 206, 218.

8. Complainant Dee Moose is a single woman who was looking for housing in August 1989 for herself, her boyfriend, her 16-year-old son and two other roommates. R. 92-93. Moose responded to a newspaper advertisement placed by Whitehall Properties for a five-bedroom house. R. 93; Exhibit M-3. She initially spoke to a woman at Whitehall Properties who asked how many people were going to live in the house. R. 94. When Moose responded that she would be living with her boyfriend, her son and two other adults, she was told that she would not be able to rent the house but would have to speak to the manager. R. 94. She then spoke to the manager, Tom Swanner, who inquired about her marital status and, upon learning that she was not married to her boyfriend, declined to show or rent her the house. R. 95, 117-121.

9. After Moose was denied the opportunity to rent from Whitehall Properties, she found another rental unit

that was suitable for her and her boyfriend. R. 99-100. The house advertised by Whitehall Properties rented for $1,295, which Moose would have split four ways with her other roommates. Instead, she ended up renting another unit which cost $675 split two ways. R. 100. Moose thus paid approximately $14 more per month for comparable housing after being rejected as a tenant by Swanner.

10. Tom Swanner denied having any recollection of meeting or speaking to Joseph Bowles, William F. Harper or Dee Moose. R. 161. However, he freely acknowledged that Whitehall Properties has a company policy of refusing to rent residential property under its management to any unmarried couples intending to live together on the premises. Affidavit of Tom Swanner at 2; R. 162. It is undisputed that each of the complainants was rejected as a tenant because of this policy and for no other reason. If the complainants had been married to their partners at the time they sought housing from Swanner, he would have rented to them. R. 273.

11. Whitehall's policy is based on Swanner's religious beliefs that cohabitation without marriage is sinful and immoral, and that it would be sinful for him to knowingly permit such conduct. R. 165-70; Affidavit of Swanner at 2. Under Swanner's religious beliefs, even a platonic non-sexual living arrangement by unmarried couples would be considered immoral and sinful because such an arrangement would still suggest the appearance of immorality. R. 188-89, 301-04. Furthermore, where there is a conflict between the "laws of man" and the "laws of God," the laws of God must take precedence. R. 193, 328, 336.

12. Prior to rejecting Bowles, Harper and Moose as tenants, Swanner did not ask about their proposed sexual conduct or intentions. R. 54, 99, 142-43, 206. Typically, in the course of interviewing prospective tenants, Swanner would ask them to tell him about their family and/or identify who would live in the rental unit. If the prospective tenant's answer indicated that an unmarried couple was planning to live together on the premises, Swanner would refuse to rent or show the property. R. 298-300.

13. Swanner informed each owner of property managed by him of his policy of refusing to rent to unmarried couples. Each owner listing property with Swanner was required to acknowledge and agree with Swanner's policy. R. 329, 342-43. Bruce and Kathryn Kniegge, owners of the property sought to be rented by Joseph Bowles, were specifically aware of Swanner's policy against renting to unmarried couples. R. 341-42.

CONCLUSIONS OF LAW

I. DID TOM SWANNER d/b/a/ WHITEHALL PROPERTIES DISCRIMINATE AGAINST JOSEPH BOWLES, WILLIAM F. HARPER AND DEE MOOSE ON THE BASIS OF MARITAL STATUS IN VIOLATION OF AMC 5.20.020 AND AS 18.80.240?

AMC 5.20.020(A) provides in pertinent part that it is unlawful for a manager of real property "[t]o refuse to sell, lease or rent real property to a person because of . . . marital status. . . . " Paragraph C of that section provides that it is unlawful "[t]o make a written or oral inquiry or record of the . . . marital status . . . of a person

seeking to buy, lease or rent real property. . . . " Paragraph E of that section makes it unlawful " . . . to refuse a person the right to inspect real property, because of the . . . marital status . . . of that person or because of any person associated with that person. . . . "

AMC 5.20.010(K) defines "marital status" to include "differential treatment shown toward a person because he/she is not married" or because "he/she is a parent and unmarried." AMC 5.20.010(M) defines a "person" to include "one or more individuals."

In addition to the Anchorage Municipal Code, state law in AS 18.80.240 contains similarly worded prohibitions against discrimination in the rental of real property on the basis of marital status.

The basic relevant facts are not in dispute. Complainants Bowels, Harper and Moose sought to inspect and/or rent residential units managed by respondent Swanner. In each case, upon learning that the prospective tenant was unmarried and intended to live with a person of the opposite sex to whom he or she was not married, Swanner refused to rent to them or show them any available residential units. Swanner's sole reason for such refusal was his religious belief that cohabitation is immoral and must take precedence over any conflicting government laws.

Swanner contends that his refusal to rent housing to unmarried couples wishing to live together does not constitute "marital status" discrimination under state or municipal law. He argues that since he rents to persons of every type of marital status – single, married, divorced,

separated or widowed – he is therefore not discriminating on the basis of a prospective tenant's *individual marital status* but rather because of the prospective tenant's proposed *conduct* in living with a person of the opposite sex to whom he or she is not married.

Swanner's argument, however, is nothing more than a variation of a similar contention recently rejected by the Alaska Supreme Court in *Foreman v. Anchorage Equal Rights Commission*, 779 P.2d 1199 (Alaska 1989). In *Foreman*, a landlord rented property to single parents with children and to married couples with or without children, but refused to rent to an unmarried couple with an infant child. 779 P.2d at 1200. The landlord argued that state and municipal prohibitions against discrimination based on marital status do not protect the interests of unmarried couples and only prohibit discrimination against an individual person based on that person's marital status. *Id.* at 1201. The Supreme Court, however, flatly rejected this argument, relying on the broad definition of "person" in both state and municipal law. *Id.* at 1201-02. The court held:

> We conclude that state and municipal prohibitions against discrimination based on marital status protect the rights of unmarried couples. The Foremans would have rented the apartment to Hohman, Kiefer and the infant had Hohman and Kiefer been married; the Foremans refused to rent the apartment only after they learned that Hohman and Kiefer were not married. This constitutes unlawful discrimination based on marital status.

Id. at 1203.

Swanner insists that he rejects unmarried couples solely because of their conduct in living together outside the bonds of marriage and not because of their individual marital status. This purported distinction between "cohabitation" and "marital status" is artificial and without merit. To "cohabit" has been defined as "to live together in a sexual relationship when not legally married." *The American Heritage Dictionary of the English Language* 259 (1980) (New College Dictionary). By definition, therefore, cohabitation refers only to couples who are not married to each other – a protected marital status under *Foreman*. Swanner himself admitted that if the complainants had been married to their partners at the time they sought housing from him, he would have rented to them. R. 273. Thus, it is evident that the critical factor in Swanner's rejection of complainants was not any particular conduct on their part, but rather the mere fact that they were not married to their partners.

This conclusion is buttressed by Swanner's own testimony that he did not inquire about the sexual conduct or intentions of prospective tenants. R. 309, 319. In fact, Swanner made clear that his moral objections to unmarried couples living together applied equally to purely platonic relationships because of the appearance of sexual immorality. R. 302-03. Further, Swanner's moral objections to the sexual conduct of unmarried prospective tenants is not supported by current state law. Cohabitation involving adultery or fornication is no longer illegal or criminal conduct in Alaska. *See* former AS 11.40.040 (repealed 1978).

The evidence also indicates that in order for Swanner to implement his policy of rejecting unmarried couples

wishing to live together, he initially must determine the marital status of prospective tenants. Typically, he accomplishes this objective by questions such as "Tell me about your family" or "Who will live there?" R. 299, 309. To the extent that such inquiries are designed to elicit the marital status of prospective tenants for the purpose of rejecting unmarried couples, they are plainly in violation of municipal and state law. *See* AMC 5.20.020(C) and AS 18.80.240(3). Swanner's explanation that marital status information is necessary for the credit report is simply not credible, since the evidence makes clear that his inquiries concerning marital status were made at the outset of contact with prospective tenants and none of the complainants ever reached the point of being allowed to fill out a credit report.

For the foregoing reasons, it is concluded that Swanner's rejection of Joseph Bowles, William F. Harper and Dee Moose constitutes discrimination on the basis of marital status in violation of AMC 5.20.020 and AS 18.80.240.

II. DOES ENFORCEMENT OF AMC 5.20.020 OR AS 18.80.240 VIOLATE SWANNER'S CONSTITUTIONAL RIGHTS TO THE FREE EXERCISE OF HIS RELIGION?

Swanner next contends that even if his conduct toward complainants is found to have violated municipal or state anti-discrimination laws, enforcement of such laws would violate his right to the free exercise of his religion under the First Amendment of the United States

Constitution and Article I, Section 4 of the Alaska Constitution.

Under the U.S. Constitution, the freedom of religious belief has been protected absolutely. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). Action or conduct based on religious beliefs, however, can be prohibited or regulated by a government where it poses a substantial threat to public safety, peace or order, *Sherbert v. Verner*, 374 U.S. 398, 403 (1963), or where there is a competing governmental interest of the highest order that cannot be served by less restrictive means. *Wisconsin v. Yoder*, 406 U.S. 205, 115 (1972).

The U.S. Supreme Court has long recognized the distinction between religious belief and conduct as far as government regulation is concerned. In *Reynolds v. United States*, 98 U.S. 145 (1879), the court rejected the claim that criminal laws against polygamy could not be constitutionally applied to those whose religious beliefs commanded the practice. The court stated:

> Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. . . . Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.

98 U.S. at 166-67.

Subsequent decisions of the U.S. Supreme Court have consistently held that the right of free exercise of religion does not relieve an individual of the obligation to comply

with a "valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. ___, 110 S.Ct. 1595, 1600 (1990), *quoting United States v. Lee*, 455 U.S. 252, 263 n.3 (1982); *see also Minersville School Dist. Bd. of Educ. v. Gobitis*, 310 U.S. 586, 594-95 (1940).

In a line of cases beginning with *Sherbert v. Verner*, 374 U.S. 398 (1963), the U.S. Supreme Court adopted a balancing test to determine whether generally applicable laws that substantially burden a religious belief or practice are justified by a compelling governmental interest. *Id.* at 402-03. However, in a significant change of course, the court recently found the *Sherbert* balancing test inapplicable to a free exercise challenge to a state's denial of unemployment benefits to persons terminated from employment for engaging in religiously-based sacramental use of the drug peyote. *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. ___, 110 S.Ct. 1595 (1990). Writing for a majority of the court, Justice Scalia declined to apply the *Sherbert* "compelling government interest" balancing test and broadly stated that:

> [I]f prohibiting the exercise of religion . . . is . . . merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended. * * * We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.

> On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition. * * * To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious belief, except where the State's interest is "compelling" – permitting him, by virtue of his beliefs, "to become a law unto himself," *Reynolds v. United States*, 98 U.S., at 167 – contradicts both constitutional tradition and common sense.

Smith, 110 S.Ct. at 1600, 1603.

In the present case, both municipal and state anti-discrimination provisions at issue are facially neutral prohibitions of general applicability. Their purpose is not to prohibit or regulate the exercise of religion but to combat the evils of discrimination, a valid legislative objective. Their impact on the free exercise of religious beliefs is entirely incidental to their central purpose. Accordingly, under the current analysis of the U.S. Supreme Court as expressed in *Smith*, the "compelling government interest" balancing test adopted in *Sherbert v. Verner* would likely be found to be inapplicable and Swanner's free exercise of religion claim under the U.S. Constitution would be summarily rejected.

In reviewing free exercise of religion claims under the Alaska Constitution, the Alaska Supreme Court has generally followed the traditional guidelines developed by the federal courts. *See, e.g., Seward Chapel, Inc. v. City of Seward*, 655 P.2d 1293 (Alaska 1982); *Frank v. State*, 604 P.2d 1068 (Alaska 1979). The court first examines whether the conduct in question is truly based on sincerely held religious beliefs, and whether the challenged government

law imposes an unacceptable burden on the exercise of those religious beliefs. *Seward Chapel*, 655 P.2d at 1301-02; *Frank*, 604 P.2d at 1071-72. If an unacceptable burden on religious beliefs is established, the court then determines whether there is a sufficiently compelling government interest that would suffer if an exemption were to be granted to accommodate the religious practice at issue. *Frank*, 604 P.2d at 1073-74.

There is no dispute that Swanner's rejection of unmarried couples as prospective tenants is based on his sincerely held religious beliefs. However, Swanner has failed to establish that enforcement of state or municipal anti-discrimination law would impose a significant or unacceptable burden on the exercise of his religious beliefs. Swanner's conduct as a manager of rental property is clearly part of a secular, commercial enterprise in which he engages voluntarily for profit. His company is not organized as a religious or charitable institution. Although it might be inconvenient or costly to Swanner to reject unmarried couples and have to look for other tenants who comply with his religious moral standards, there is nothing that compels him to extend his religious views to the secular, commercial marketplace of residential rental property. As succinctly stated by the U.S. Supreme Court,

> When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity.

United States v. Lee, 455 U.S. 252, 261 (1982).

Moreover, unlike the situation in *Frank* where the Alaska Supreme Court held that an accommodation must be made for a Native Alaskan to hunt moose out of season for a funeral potlatch ceremony, Swanner was not faced with a Hobson's choice of either complying with the law or abandoning the precepts of his religion. *Cf. Frank*, 604 P.2d at 1071-73; *see also Seward Chapel*, 655 P.2d at 1301. To comply with the law and still follow his religious beliefs, Swanner simply could have chosen not to engage in the real estate business. Equally significant, there has been no showing in this case that enforcement of the law would adversely impact Swanner's participation in religious ceremonies, worship or sacramental practices. *Cf. Frank*, 604 P.2d at 1071-73.

Even if it could be demonstrated that the law imposes an unacceptable burden on Swanner's religious beliefs, there is clearly a compelling government interest in eradicating discrimination in real estate transactions and providing equal access to housing. Housing is a basic human need regardless of marital status. Both the state and municipal anti-discrimination laws contain explicit statements of purpose to combat discrimination in all areas of social and economic life, including housing and real estate transactions. *See* AMC 5.10.010 and AS 18.80.200. "Discrimination" is broadly defined in the Municipal Code as "any direct or indirect act or practice" that differentiates between persons on the basis of, among other things, marital status. AMC 5.20.010(D).

In addition, the Alaska Supreme Court has consistently recognized the broad legislative intent underlying the anti-discrimination laws. *See, e.g., Alaska USA Federal Credit Union v. Fridriksson*, 642 P.2d 804, 806 (Alaska 1982);

Loomis Electronics Protection, Inc. v. Schaefer, 549 P.2d 1341, 1343 (Alaska 1976). Statutory exceptions from the requirements of anti-discrimination laws have been narrowly and strictly construed against those seeking such an exception. *See McLean v. State*, 583 P.2d 867, 869-70 (Alaska 1978). In this regard, Swanner has failed to demonstrate that there are any less restrictive means of achieving compliance with the law while still permitting him to discriminate on the basis of his religious beliefs.

Furthermore, if Swanner were to be granted an exemption from the law based on his religious beliefs, it is evident that the basic purpose of the law to eradicate discrimination would be frustrated. Swanner's own expert witness on theological issues testified that any person would have the right to follow his or her own religious beliefs whenever they are in conflict with the laws of man. R. 193-94. Thus, any other religiously-motivated persons would have grounds to engage in discrimination on the basis of their religious beliefs.

Swanner places great reliance on the recent decision of the Minnesota Supreme Court in *Minnesota v. French*, 460 N.W.2d 2 (Minn. 1990). In *French*, the court held that a landlord's refusal to rent to an unmarried couple did not violate the Minnesota Human Rights Act's prohibition of marital status discrimination, and further that the landlord's right to exercise his religious beliefs under the Minnesota Constitution outweighed any competing interest to allow cohabitation by unmarried couples in rental property.

While the facts in *French* are reasonably analogous to the present case, there are several significant legal differences which render that decision readily distinguishable. Unlike Alaska law, the Minnesota Human Rights Act in effect at the time of the alleged discrimination in *French* did not contain any definition or elaboration of the concept of "martial status." *French*, 460 N.W.2d at 4. Because the court believed that "marital status" was an ambiguous term, it referred to legislative policy and intent for guidance. The court found that Minnesota's fornication statute was still in effect and therefore legislative policy discourage the practice of fornication and protected the institution of marriage. *Id.* at 5-6. However, the court fully recognized that, in contrast, the Alaska Supreme Court in *Foreman* had relied greatly on the fact that Alaska's fornication statute had been repealed in concluding that cohabiting unmarried couples were protected under Alaska anti-discrimination law. *Id.* at 7.

Additionally, the court in *French* interpreted the free exercise clause of the Minnesota Constitution as providing "far more protection" of religious freedom than the broad language of the United States Constitution. *Id.* at 9-10. Because of the historically broad protection of religious liberty under the Minnesota Constitution, and the fact that the Minnesota fornication statute was still in effect, the court concluded that there was an insufficiently compelling state interest to prohibit discrimination against cohabiting unmarried couples. *Id.* at 10.

The principal factors relied upon by the court in *French* simply do not exist in the present case. The Alaska Legislature repealed the Alaska cohabitation statute in 1978, removing any taint of illegality from such conduct.

In addition, the challenged Alaska laws contain broad definitions of "marital status" and "person" which have been interpreted by the Alaska Supreme Court to specifically include unmarried couples. *Foreman*, 779 P.2d at 1203. Further, there is no indication that the Alaska Supreme Court would interpret the free exercise clause of the Alaska Constitution in a significantly more expansive manner than the United States Constitution.

For the foregoing reasons, it is concluded that the enforcement of applicable anti-discrimination laws against Swanner would not violate his constitutional rights to the free exercise of his religious beliefs.

III. DEFAULT JUDGMENT AGAINST RESPONDENTS BRUCE A. AND KATHRYN L. KNIEGGE

Respondents Bruce A. and Kathryn L. Kniegge failed to appear at the hearing or otherwise defend in this matter despite having been duly served with all relevant pleadings and documents.

Upon application by complainants pursuant to AERC Rule of Procedure 5.10.013, the Hearing Examiner issued an order to show cause why a default judgment should not be entered against the Kniegges. A response was received from the Kniegges in Colorado indicating they did not have the funds to travel to Anchorage for the hearing. However, where a party has been properly served with a complaint and duly notified of the public hearing, lack of funds does not constitute good cause for failing to appear or defend. Accordingly, the Hearing Examiner recommends that the AERC enter a judgment

by default against Bruce A. and Kathryn L. Kniegge, including a remedial order as described below.

IV. REMEDIES

AMC 5.30.050(A) provides that if a person is found to have engaged in discriminatory conduct, the AERC may order him or her to refrain from engaging in such conduct and may prescribe conditions on the person's future conduct relevant to the discrimination. Additionally, in the case of housing discrimination, AMC 5.30.050(A)(2) authorizes the AERC to order "any equitable relief," including an order compelling the respondent to rent or sell particular property to the complaint. *See also* AERC Rule of Procedure 5.10.016.

In this case, complainants do not seek an order compelling Swanner to rent to them since they were able to find alternative housing. However, complainants request that an order be entered directing Swanner and his agents or employees to cease and desist from any further conduct in violation of AMC 5.20.020, and specifically to refrain from inquiring about marital status and from refusing to show and/or rent property to unmarried couples on the same terms and conditions as similarly situated married couples. Further, due to the asserted extent, seriousness and willfulness of Swanner's conduct, complainants request an order requiring him to post copies of a notice prepared by AERC staff and to distribute copies of the notice to all owners, tenants and future applicants for rental housing managed by Swanner. *See* "Notice to Applicants for Rental Housing" attached to complainants' post-hearing brief.

Based on a review of all the facts and circumstances in this case, the Hearing Examiner concludes that the above relief requested by complainants is clearly within the scope of the AERC's remedial authority and is reasonably designed to prevent a recurrence of similar discriminatory conduct in the future. However, it is recommended that the notice prepared by AERC staff be amended as follows: deletion of the first full sentence; deletion of any reference to the award of compensatory damages (discussed *infra*); and substitution of the AERC's signature for that of Tom Swanner. Additionally, it is recommended that the notice requirement expire after one year from the date of the AERC's final order.

Complainants also request an order requiring Swanner to pay them compensatory damages for their additional expenses incurred in obtaining alternative housing. However, complainants have not demonstrated that the AERC has the authority to award compensatory or actual damages in cases of housing discrimination. AMC 5.30.050 expressly limits the AERC's remedial authority to equitable relief only. There is no indication that the Municipal Assembly intended to authorize the AERC to award compensatory damages in housing discrimination cases.

In contrast, AS 18.80.130 – the statute describing the remedial authority of the state Human Rights Commission – specifically authorizes that agency to award actual damages in housing discrimination cases. *Compare* AMC 5.30.050(A)(2) *with* AS 18.80.130(a)(2). Moreover, the Alaska Supreme Court has ruled that the state Human Rights Commission could not award compensatory or punitive damages where it lacked the specific statutory

authority to do so under AS 18.80. *See McDaniel v. Cory*, 631 P.2d 82, 86-89 (Alaska 1981); *see generally* 85 A.L.R.3d 351. For the foregoing reasons, the Hearing Examiner concludes that complainants' request for compensatory damages must be denied.

With respect to respondents Bruce A. and Kathryn L. Kniegge, the Hearing Examiner has recommended that a default judgment be entered against them. The evidence indicates that the Kniegges were fully aware of, and consented to, Swanner's policy of discriminating against unmarried couples who wished to live together on property owned by the Kniegges and managed by Swanner. R. 341-42. Pursuant to the AERC's remedial authority, the Hearing Examiner recommends that Bruce A. and Kathryn L. Kniegge be ordered to refrain from any further conduct in violation of applicable municipal or state anti-discrimination laws, and specifically to refrain from listing any rental property with any person or company that refuses to rent to unmarried couples on the same terms and conditions as to married couples.

PROPOSED ORDER

Based on the foregoing findings of fact and conclusions of law, the Hearing Examiner recommends that the Anchorage Equal Rights Commission adjudge, declare and order as follows:

1. Tom Swanner d/b/a Whitehall Properties has violated AMC 5.20.020 and AS 18.80.240 by discriminating against complainants Joseph Bowles, William F. Harper and Dee Moose on the basis of marital status in the rental of real property.

2. Tom Swanner d/b/a Whitehall Properties, and his agents or employees, shall immediately cease and desist from any further conduct in violation of AMC 5.20.020 or AS 18.80.240, and specifically shall refrain from inquiring about marital status and from refusing to rent and/or show rental properties to unmarried couples on the same terms and conditions as similarly situated married couples.

3. Tom Swanner d/b/a Whitehall Properties shall post in his business office the "Notice to Applicants for Rental Housing" prepared by AERC staff and shall mail or distribute copies of the notice to all current owners, tenants and future applicants for rental housing managed by him. The notice shall be amended as described in Section IV of the Conclusions of Law herein and shall be posted and distributed for one year after entry of the AERC's final order in this matter.

4. Complainants' request for compensatory damages is denied and dismissed.

5. Bruce A. and Kathryn L. Kniegge are in default for failing to appear or otherwise defend in this matter, and judgment by default is hereby entered against them.

6. Bruce A. and Kathryn L. Kniegge shall cease and desist from any further conduct in violation of AMC 5.20.020 or AS 18.80.240, and specifically shall refrain from listing any rental property with any person or company that refuses to rent to unmarried couples on the same terms and conditions as similarly situated married couples.

DATED this 7th day of January, 1991, at Anchorage, Alaska.

/s/ Robert W. Landau
ROBERT W. LANDAU
HEARING EXAMINER

APPENDIX E

United States Constitution, Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment XIV:

> SECTION I. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. §§ 2000bb *et. seq.*:

> § 2000bb(a): The Congress finds that (1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution; (2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise; (3) governments should not substantially burden religious exercise without compelling justification; (4) in Employment Division v. Smith, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion;

and (5) the compelling interest test set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing governmental interests.

§ 2000bb-1(a): In General. Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

§ 2000bb-1(b): Exception. Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person (1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that compelling government interest.

§ 2000bb-2(1): the term "government" includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, a State, or a subdivision of a State;

§ 2000bb-3(a): In General. This chapter applies to all Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993.

A.S. § 18.80.240:

> It is unlawful for the owner, lessee, manager, or other person having the right to sell, lease, or rent real property (1) to refuse to sell, lease, or rent the real property to a person because of sex, marital status, changes in marital status, pregnancy, race, religion, physical or mental disability, color, or national origin; however, nothing in

> this paragraph prohibits the sale, lease, or rental of classes of real property commonly known as housing for "singles" or "married couples" only; . . . (3) to make a written or oral inquiry or record of the sex, marital status, changes in marital status, pregnancy, race, religion, physical or mental disability, color, or national origin of a person seeking to buy, lease, or rent real property;

A.M.C. § 5.20.020:

> Except in the individual home wherein the renter or lessee would share common living areas with the owner, lessor, manager, agent or other person, it is unlawful . . . (A) To refuse to . . . rent the real property to a person because of . . . marital status . . . (C) To make a written or oral inquiry or record of the . . . marital status . . . of a person seeking to . . . rent real property;

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(2)

Supreme Court, U.S.
FILED
AUG 24 1994
OFFICE OF THE CLERK

NO. 94-169

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

TOM SWANNER, d/b/a WHITEHALL PROPERTIES,

Petitioner,

vs.

ANCHORAGE EQUAL RIGHTS COMMISSION, PAUL L. CONNERTY, EXECUTIVE DIRECTOR, ex rel. JOSEPH BOWLES, WILLIAM F. HARPER and DEE MOOSE,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALASKA

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the decision of the Alaska Supreme Court based on independent and adequate state grounds?

2. Does enforcement of Alaska's laws against housing discrimination based on marital status violate Petitioner's rights under the free exercise clause of the First Amendment to the United States Constitution, under either the Smith test or the Sherbert/Yoder balancing test?

3. Does the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb et. seq. (1993) violate the principle of separation of powers?

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STATEMENT OF THE CASE

Respondent Anchorage Equal Rights Commission (AERC) accepts the statement of facts in Petitioner's Statement of the Case, but believes clarification is necessary for an accurate understanding of the decision this Court is asked to review. At issue is whether the Alaska Supreme Court correctly concluded that the First Amendment free exercise clause does not entitle Petitioner to engage in discriminatory conduct in his commercial business, in violation of specifically applicable state and municipal civil rights legislation.

Petitioner's commercial activity is real estate rental. The conduct prohibited by Alaska law[1] is his refusal to rent real property to unmarried couples on the basis of their marital status.

Applying the balancing test set out by this Court in Sherbert v. Verner and Wisconsin v. Yoder, the Alaska Supreme Court found as a matter of state law that Petitioner was not entitled to an exemption under the free exercise clause of the Alaska Constitution. The court reached the same conclusion with respect to the U.S. Constitution, based on its separate analysis under Employment Div., Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990) (hereinafter "Employment Division v. Smith").

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[1] See Foreman v. Anchorage Equal Rights Comm'n, 779 P.2d 1199, 1203 (Alaska 1989).

Petitioner moved for rehearing on grounds that Congress' recent enactment of the Religious Freedom Restoration Act (RFRA) reinstated the pre-Smith (Sherbert) balancing test for First Amendment free exercise claims under the U.S. Constitution. Since the court had already analyzed Alaska's identical free exercise clause under this balancing test, the court issued a revised opinion stating that RFRA would not change its holding since the RFRA test was satisfied by the state constitutional analysis.

Swanner's Petition for Writ of Certiorari should be denied either for lack of federal question jurisdiction or by reason of the substantive merits of the challenged decision.

SUMMARY OF THE ARGUMENT

Swanner's Petition for Writ of Certiorari should be denied by the Court for a number of reasons. First, the decision of the Alaska Supreme Court which Petitioner asks this Court to review is expressly and independently based on an analysis and interpretation of the Alaska Constitution. Pursuant to state law, the court determined that Swanner is not entitled to an exemption from state and municipal civil rights laws which prohibit discrimination in housing based upon marital status, because the state has a clearly expressed interest of the highest order in prohibiting such conduct. The Alaska court's decision is independent of the federal question, rests squarely on adequate state grounds, and thus is not a proper subject for review by this Court.

Second, there is no conflict between the Alaska court's determination of a federal question and any determination by another state court that might justify review. The cases which Petitioner cites are either intermediate appellate decisions and not the decisions of state courts of last resort, or are decisions expressly decided on state constitutional grounds under free exercise provisions significantly dissimilar to the U.S. and Alaska Constitutions.

The Alaska court's decision is also correct on its substantive merits. Petitioner agrees that the court correctly analyzed and applied the rule announced in this Court's Smith decision to his free exercise claim.

Petitioner's claim is that the Religious Freedom Restoration Act (RFRA) rejected the Smith rule and "restored" this Court's previous free exercise analysis as described in the Sherbert/Yoder cases. However, in requesting that this Court review the Alaska decision, Petitioner ignores the fact that the Alaska court applied the Sherbert test to his free exercise claim as a matter of state constitutional law.

Because Petitioner's free exercise claim fails both the Smith and the Sherbert tests, it is unnecessary for this Court to decide which rule governs federal free exercise claims. For this reason it is also unnecessary for the Court to reexamine and overrule Smith, as urged by Petitioner, or to determine the constitutionality of the Religious Freedom Restoration Act. Respondents assert that this case simply does not present any "special and important reasons" justifying this Court's exercise of discretionary review.

Should this Court determine to grant the Petition for Writ of Certiorari, Respondents believe that it would be appropriate for the Court to consider the constitutionality of RFRA in resolving Petitioner's question as to the appropriate federal constitutional analysis of his free exercise claim.

ARGUMENT

I. THE COURT SHOULD DECLINE TO HEAR THIS CASE BECAUSE THERE IS NO FEDERAL QUESTION IN CONFLICT

A. THE ALASKA SUPREME COURT DECISION IS BASED ON STATE LAW GROUNDS THAT ARE INDEPENDENT OF THE FEDERAL QUESTION AND ADEQUATE TO SUPPORT THE JUDGMENT

This Court has stated that it "will not review a question of federal law decided by a state court" if that court's decision "rests on a state law ground that is independent of the federal question and adequate to support the judgment." Coleman v. Thompson, 501 U.S. 722, 111 S. Ct. 2546, 2553-54 (1991). Granting review in such cases offends traditional notions of federalism, and could only result in the rendering of an advisory opinion, since the state court judgment would be unaffected by the Court's determination of the federal question. Id.[2]

[2] Similarly, this Court has said "[i]t is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions." Michigan v. Long, 463 U.S. 1032, 1041 (1983) (citation omitted).

Here, Petitioner's First Amendment free exercise claim was analyzed and decided in accordance with this Court's decision in Employment Division v. Smith, 494 U.S. 872 (1990).[3] See Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 279-80 (Alaska 1994), Petition for Writ of Certiorari (hereinafter "Petition"), App. A at 15-23. Petitioner's claim under the identical free exercise clause of the Alaska Constitution, in contrast, was analyzed and decided according to the Sherbert/Yoder balancing test,[4] which had previously been adopted and endorsed by the Alaska Supreme Court in Frank v. State, 604 P.2d 1068 (Alaska 1979).

Because the government's burden is greater under the Sherbert/Yoder test than it is under the Smith

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[3] "[A] law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." See Church of the Lukumi Babalu Aye v. City of Hialeah, 113 S. Ct. 2217, 2226 (1993) (citing Employment Division v. Smith, 494 U.S. 872 (1990)).

[4] "[R]eligiously impelled actions can be forbidden only where they pose 'some substantial threat to public safety, peace or order,' or where there are competing governmental interests that are 'of the highest order and [are] not otherwise served." Frank v. State, 604 P.2d 1068, 1070 (Alaska 1979) (quoting respectively, Sherbert v. Verner, 374 U.S. 398, 403 (1963) and Wisconsin v. Yoder, 406 U.S. 205, 215 (1972)).

test, this Court's federal question determination would not affect the outcome of the case. The state law grounds of the challenged decision are clearly "independent" of the federal law grounds[5] and are "adequate" to support the judgment against Petitioner. This is the classic situation in which denial of a Petition for Writ of Certiorari is required.[6]

B. THERE IS NO CONFLICT BETWEEN THE ALASKA COURT'S FEDERAL QUESTION DETERMINATION AND THE DECISIONS OF THE MINNESOTA, MASSACHUSETTS OR CALIFORNIA COURTS

The four cases Petitioner cites as conflicting with the Swanner decision are either based entirely on interpretations of state constitutions, or they are not decisions from the state courts of last resort. The Minnesota Supreme Court specifically said in the French

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[5] "[W]e conclude that enforcement of AMC 5.20.020 and AS 18.80.240 against Swanner does not violate his right to free exercise of religion under the Alaska Constitution." Swanner v. AERC, 874 P.2d at 280, Petition, App. A at 15.

[6] This also eliminates any need for this Court to reconsider its Smith decision. See N.L.R.B. v. Hanna Boys Center, 940 F.2d 1295, 1305 (9th Cir. 1991) (unnecessary to decide Smith's application where free exercise claim could not survive even the Sherbert test), cert. denied, 112 S. Ct. 2965 (1992).

case, "[s]ince our decision is based entirely on interpretation of our state statutes and on the Minnesota Constitution, we need not address respondent's arguments as to the application of the United States Constitution, and we decline to do so." Minnesota v. French, 460 N.W.2d 2, 11 (Minn. 1990). In addition, the free exercise language of the Minnesota Constitution differs dramatically from that of the U.S. and Alaska Constitutions.[7]

Similarly, the recent Massachusetts case of Attorney General v. Desilets, 636 N.E.2d 233 (Mass. 1994) is also based entirely on state constitutional grounds. Id. at 235-36.[8] Thus, it does not pose the

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[7] Unlike the Alaska laws, the Minnesota statute did not define "marital status." Id. at 4. Construing it to include unmarried cohabiting couples would have been in direct conflict with Minnesota's fornication statute, its legislature's express intent to "discourag[e] the practice of fornication and protect the institution of marriage," and case law. Id. at 4-7. Alaska, in contrast, had repealed its fornication statute several years earlier. The Alaska Supreme Court took note of the French decision, stating that for the foregoing reasons, it did not provide the court with "meaningful guidance in interpreting the Free Exercise Claim of the Alaska Constitution." Swanner, 874 P.2d at 281 n.10, Petition, App. A at 16.

[8] The court recognized Smith as the rule for the federal First Amendment claim, but undertook no analysis of it. Desilets, 636 N.E.2d at 236. It

sort of conflict which gives rise to "federal question" review under 28 U.S.C. § 1257(a) and Sup. Ct. R. 10.1(b) (1994). Moreover, the cited case is not a final decision from a state court of last resort. The Massachusetts court simply vacated a grant of summary judgment and remanded the case to the trial court. Even in remanding the case, the Massachusetts court made clear it was not precluding the government from demonstrating a more narrow "compelling interest," i.e., an interest in eliminating marital status discrimination in housing as opposed to just generally. Desilets, 636 N.E.2d at 238, 240-41. The Swanner decision is based precisely on the court's determination that such an interest exists.

This Court need not even consider the two California decisions which Petitioner cites because, by definition, neither can create a conflict over which the Court may exercise jurisdiction. Neither is from the "state court of last resort." Sup. Ct. R. 10.1(b) (1994). The decisions do not raise theoretical conflicts either.

In fact, in the most recent case (post-RFRA), the California court applied the federal Smith rule, noting it

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specifically based its decision solely on its interpretation of the Massachusetts Constitution. Massachusetts also has a fornication statute as well as a second constitutional article, unparalleled in the U.S. and Alaska Constitutions, protecting religious free exercise rights. Id. at 240-42.

"purports to be a logical extension of the established free exercise jurisprudence" of this Court. Smith v. Commission of Fair Employment and Housing, 30 Cal. Rptr. 2d 395, 400 (Cal. App. 1994). Because the Court of Appeals determined that the case was a "paradigm of the 'hybrid' genus" free exercise case, its outcome under Employment Division v. Smith is distinguishable and not in conflict with the outcome in Swanner. Id. at 403.[9]

The other case Petitioner cites is an unpublished appellate decision from the California Court of Appeals, which by court rule has no precedential value. Cal. R. Ct. 977(a). See Donahue v. Fair Employment Housing Comm'n, 2 Cal. Rptr. 2d 32 (Cal. App. 1991), review granted and opinion superseded, 825 P.2d 766 (Cal. 1992), review dismissed as improvidently granted, 859 P.2d 671 (Cal. 1993). Like the Minnesota and

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[9] In addition to her free exercise claim, plaintiff also claimed her First Amendment freedom of speech had been abridged. Id. at 401. The Court of Appeals concluded that the interest in eradicating housing discrimination against unmarried couples would have to give way to plaintiff's free speech and free exercise rights. Smith, 30 Cal. Rptr. 2d at 404, 406. It relied on the 'hybrid' nature of the case to distinguish its holding from federal cases that hold "in certain instances free exercise rights must give way to the greater public good." Smith, 30 Cal. Rptr. 2d at 406 (citing U.S. v. Lee, 455 U.S. 252 (1982) and Braunfield v. Brown, 366 U.S. 599 (1961)).

Massachusetts decisions, Donahue is based on state constitutional grounds and therefore raises no conflict with the Alaska decision here.[10]

II. THE ALASKA SUPREME COURT'S DECISION IS CORRECT ON THE MERITS AND THE OUTCOME IS THE SAME WHETHER THE CONTROLLING FEDERAL LAW IS SMITH OR THE SHERBERT/YODER TEST ENDORSED BY THE RELIGIOUS FREEDOM RESTORATION ACT

Petitioner's "Questions Presented" indicate that he does not disagree with the state court's analysis of his federal constitutional rights under Smith. He claims simply that after the enactment of the Religious Freedom Restoration Act (RFRA),[11] Smith is no longer controlling federal law and that the Sherbert/Yoder balancing test is again the rule. Petitioner glosses over the fact that the Alaska court did apply the "Sherbert/Yoder" test in construing the identical free exercise clause of the Alaska Constitution.

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[10] "Because we hold that the Donahues have a constitutionally based religious exemption on state constitutional grounds under pre-Smith case law, we need not address the Donahues' federal constitutional claim under Smith." Donahue, 2 Cal. Rptr. 2d at 40 n.10.

[11] 42 U.S.C. § 2000bb et. seq. (1993).

Under either analysis, Petitioner's claim of entitlement to an exemption from Alaska's laws against housing discrimination fails.

A. THE ALASKA COURT'S SMITH ANALYSIS OF SWANNER'S FIRST AMENDMENT FREE EXERCISE CLAIM IS CORRECT[12]

The free exercise analysis adopted by this Court in Employment Division v. Smith provides that "[a] law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." Church of the Lukumi Babalu Aye v. City of Hialeah, 113 S. Ct. 2217, 2226 (1993) (citing Smith, 494 U.S. 872 (1990)). Smith preserves the balancing test where the implicated law is not neutral or generally applicable, or where a "hybrid" situation exists, i.e., some other constitutionally protected right, in addition to the free exercise right, is implicated. Id. at 2226-27.

Applying Smith, the Alaska Supreme Court correctly found (and Petitioner does not contest) that

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[12] Because Petitioner has not directly challenged the merits of the Court's Smith analysis, Respondents' discussion is brief and intended only to provide contrast to the stricter, Sherbert/Yoder balancing analysis which follows.

the anti-discrimination laws from which Petitioner seeks exemption were not crafted to impede particular religious conduct and are in every sense valid, neutral and generally applicable. Swanner, 874 P.2d at 279-80. Petition, App. A at 13.

The only other question which the Alaska court had to consider was whether this case presented a "hybrid" situation. Since Petitioner did not make any other constitutional claim, the court correctly reasoned that enforcement of Alaska's neutral civil rights laws against him did not violate the free exercise clause of the First Amendment. Id, at 280, Petition, App. A at 14. The court's federal constitutional conclusion was simple, straightforward and squarely in accordance with Smith.

B. THE ALASKA COURT CORRECTLY APPLIED THE SHERBERT/YODER BALANCING ANALYSIS TO SWANNER'S FIRST AMENDMENT FREE EXERCISE CLAIM

The Swanner court devoted the majority of its opinion to an analysis of Swanner's free exercise rights under the stricter, Sherbert/Yoder balancing test. Since this is also the standard presumably reinstated by the Religious Freedom Restoration Act, Respondents now turn to a demonstration of how the state court correctly decided Petitioner's First Amendment free exercise claim under the Sherbert/Yoder test.

On Rehearing, the Alaska Supreme Court assumed, and respondent here assumes for the sake of argument,[13] that RFRA does in fact apply to Petitioner's federal claim. It should be noted that just prior to RFRA's enactment, Congress inserted the word "substantially" before the word "burden," thereby requiring that one claiming an exemption must first demonstrate a "substantial" burden to his or her free exercise rights before the balancing test even comes into play.[14] Thus, the Alaska Supreme Court gave

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[13] Respondents do not intend to waive their argument, asserted in response to the Petition for Rehearing, that RFRA violates the doctrine of separation of powers and is unconstitutional. Respondents' argument concerning RFRA's constitutionality is set forth in Section III, infra.

[14] See discussion of Religious Freedom Restoration Act, A Word On . . . (Office of the General Counsel, National School Boards Association), Volume IX, No. 4 (Fall 1993). The sponsors of the bill cited two decisions that were not to be affected by RFRA, because the "burdens" were more along the lines of an "incidental impact" on a religious practice than a "substantial burden." Cited were Bowen v. Roy, 476 U.S. 693 (1986) upholding Social Security number system in welfare programs, and Lyng v. Northwest Indians Protective Association, 485 U.S. 439 (1988), holding that building a road through federal park land used by Native Americans for religious rituals does not offend the free exercise clause. 139 Cong. Rec. S14365 (daily ed. Oct. 26,

Petitioner the benefit of the doubt on the "substantiality" of the government burden on his free exercise rights.

Under the Sherbert/Yoder balancing test, in order to invoke the free exercise clause, the court must find that there is a religion, the conduct in question is religiously based, and the claimant's religious beliefs are sincere. Frank v. State, 604 P.2d 1068, 1071 (Alaska 1979) (citing Wisconsin v. Yoder, 406 U.S. 205, 215-16 (1972)). This preliminary inquiry determines whether the actor's conduct is "protected religious conduct." See Frank, 604 P.2d at 1073.

The Alaska court found Petitioner's refusal to rent to unmarried individuals to be "protected religious conduct." See Swanner, 874 P.2d at 281-82, Petition, App. A at 17-18. The court proceeded to apply the rule that "[r]eligiously impelled actions can be forbidden only 'where they pose some substantial threat to public safety, peace or order, or where there are competing governmental interests that are of the highest order and . . . [are] not otherwise served.'" Seward Chapel, Inc. v. City of Seward, 655 P.2d 1293, 1301 n.33 (Alaska 1982) (quoting Frank, 604 P.2d at 1070 (citations omitted)).

1993).

The Alaska court relied on the second part of this test, i.e., whether there was a "competing state interest of the highest order." Swanner, 874 P.2d at 282-83, Petition, App. A at 18-21. The court found Petitioner's conduct to be in direct conflict with two "competing state interests." Id. It found the state has a "derivative interest" in ensuring access to housing for all of its citizens and, second, that the state has a "transactional interest" in preventing individual acts of discrimination. Swanner, 874 P.2d at 282-83, Petition, App. A at 19-20. The Swanner court was careful to hold that the state's interest was in eliminating marital status discrimination in housing, not necessarily in eliminating marital status discrimination in general.[15] Id. at 283, Petition, App. A at 21.

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[15] Contrary to Petitioner's representation, the Swanner court did not, nor was it necessary to, constitutionally equate marital status with race and gender. The court found that the focus of the government's interest "is in specifically eliminating marital status discrimination in housing." Swanner, 874 P.2d at 283, Petition, App. A at 21. In fact, the court recognized that "to avoid fraudulent availment of benefits only available to spouses," it is "arguably necessary" for the state to treat legally married couples differently from unmarried couples in certain circumstances. Id.

Petitioner criticizes the court's derivative/transactional interest analysis as a "unique adaptation of Sherbert and Yoder." Petition at 8. Identifying these state interests by descriptive names, however, neither makes them any less compelling nor affects the integrity of the court's analysis. The court's holding is consistent with Alaska's public policy and case law.[16] See Loomis Elec. Protection v. Schaefer, 549 P.2d 1341, 1343 (Alaska 1976) (given its "strong statement of purpose," and its "avowed determination to protect the civil rights of all Alaska citizens, we believe legislature intended to put as many 'teeth' into [its civil rights laws] as possible") and Alaska USA Federal Credit Union v. Fridriksson, 642 P.2d 804, 806 (Alaska 1982) ("Alaska's civil rights statute should be broadly construed 'to further the goal of eradication of discrimination'").

The Alaska court specifically held that the government has a compelling interest which supports the statutory prohibition on marital status discrimination in housing. It further stated that the best way to eliminate housing discrimination based on marital status

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[16] [I]t is the policy of the state and the purpose of this chapter to eliminate and prevent discrimination in . . . accommodations and in the sale, lease, or rental of real property because of race, religion, color, national origin, age, sex, physical or mental disability, marital status, changes in marital status, pregnancy or parenthood. Id. at 280 n.8, Petition, App. A at 13 (quoting AS 18.80.200).

is to render it unlawful. Thus, the court found that the challenged laws are the least restrictive means of accomplishing this goal. Swanner, 874 P.2d at 280, Petition, App. A at 14. The court correctly ascertained the state interests promoted by the housing laws and considered the detrimental effect an exemption would have on those interests:

> [A]llowing housing discrimination that degrades individuals, affronts human dignity, and limits one's opportunities results in harming the government's transactional interest in preventing such discrimination.

Id. at 283, Petition, App. A at 20-21.

The court also found that the laws did not burden Petitioner's beliefs, but merely regulated Petitioner's conduct of a purely commercial activity in which he

voluntarily engaged.[17] Id. at 283, Petition, App. A at 22-23. These laws are binding on Petitioner to the same extent they are binding on everyone else who chooses to engage in that commercial activity. Finally, the Alaska Supreme Court expressly noted that

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[17] There is a difference between a strictly religious activity and a commercial activity with incidental religious implications. This Court's observation in United States v. Lee, is well taken:

> When followers of a particular sect enter into commercial activities as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity.

U.S. v. Lee, 455 U.S. 252, 261 (1982). See also Ryan v. U.S. Dept. of Justice, 950 F.2d 458, 462 (7th Cir. 1991) (sympathizing with dedicated FBI agent "trapped between his career and his faith," but upholding employer's discharge for refusing, on religious grounds, to handle certain assignments); cert. denied, 112 S. Ct. 2309 (1992); American Friends Serv. Comm. v. Thornburgh, 961 F.2d 1405, 1408 (9th Cir. 1991) ("right to hire" is of insufficient constitutional protection to convert single free exercise claim into a "hybrid" case); and Kissinger v. Board of Trustees, 5 F.3d 177, 180 (6th Cir. 1993) (no violation of free exercise rights since veterinary student was not compelled to attend school where operation on live animals was part of curriculum).

Petitioner's religiously impelled actions trespassed on the private rights of others.[18] Id. at 284, Petition, App. A at 23.

This case is clearly distinguishable from what might be considered a "close call" case. It is not a case wherein the law violated is obscure or insignificant, or where the religious based conduct is a private affair that causes no harm or detriment to others.[19] It is also not a case where the statute challenged has in place a "good cause" exception or other mechanism for permitting an individualized exemption. Sherbert v. Verner, 374 U.S. 398 (1963) (unemployment compensation law permitting individual to show "good cause" for failing to accept available work must permit free exercise exemption); accord, Thomas v. Review Board, Indiana Employment Div., 450 U.S. 707 (1981).

Nor would the exemption Petitioner seeks have little effect on the governmental interest at stake. Cf. Wisconsin v. Yoder, 406 U.S. 205, 221-30 (1972) (Amish informal vocational program does not impede state's interest in preparing educated, self-reliant citizens); Frank v. State, 604 P.2d 1068, 1073-74 (Alaska 1979) (exemption to hunting laws for Athabascans needing moose meat for funeral potlatch does not impede government interest in maintaining moose population). This case is akin to those in which the religious conduct was required to yield to the overriding public interest and common good advanced by the subject law. See, e.g., U.S. v. Lee, 455 U.S. 252, 258-60 (1982) (broad public interest in maintaining a sound tax system); Bowen v. Roy, 476 U.S. 693, 707-10 (1986) (Social Security number system clearly promotes a legitimate and important public interest).

In fact, this case is far more compelling than those in which the grant of an exemption would merely burden the administration of government, because the rights of third parties must be considered as well. The exemption Petitioner seeks is nothing short of a license to discriminate against unmarried couples who approach

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[18] Swanner's free exercise claim goes beyond merely an assertion that he should not be compelled to sin himself. His claim is rather that he should not be compelled to "facilitate" the sin of another. Petition at 5. His argument based on "facilitation" of sins impacts the rights of third parties who may not share his religious views, or whose sincerely held religious beliefs may permit cohabitation. Granting an exemption to the landlord in such an instance would raise establishment clause concerns by preferring one religious view over another, and could give rise to a claim by a prospective tenant of housing discrimination based on both marital status and religion.

[19] See, e.g., Lawson v. Dugger, 844 F. Supp. 1538, 1542 (S.D. Fla. 1994) (prisoner's reading of Hebrew Israelite literature); Frank v. State, 604 P.2d 1068 (Alaska 1979) (securing moose meat for Athabascan funeral potlatch).

his business to secure housing. Like all other Alaska citizens, these third parties have protected privacy interests as well as rights to be free from discrimination in housing. The Alaska Supreme Court's analysis is consonant with this Court's decision in Sherbert and Yoder and its judgment was absolutely correct.

> As [James] Madison summarized the point, free exercise should prevail in every case where it does not trespass on private rights or the public peace.

Swanner, 874 P.2d at 284, Petition, App. A at 23 (citing Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 Chi. L. Rev. 1109, 1145 (1990) (citation omitted)).

III. THE RELIGIOUS FREEDOM RESTORATION ACT, WHICH PURPORTS TO OVERRULE SMITH, IS UNCONSTITUTIONAL

Petitioner asserts here, as he did in his Petition for Rehearing before the Alaska Supreme Court, that RFRA "overrules" Employment Division v. Smith, and requires application of the Sherbert/Yoder "compelling interest test" to free exercise claims. Although deciding which law controls is unnecessary here since Petitioner's claim fails under both, should the Court decide to take this case, Respondents are prepared to demonstrate that RFRA is unconstitutional. In enacting RFRA, Congress quite simply attempted to overrule a

decision of this Court, and to instruct the Court as to the proper interpretation of the United States Constitution.

It has been settled law since 1803 that "[i]t is emphatically the province and duty of the judicial department to say what the law is." Marbury v. Madison, 5 U.S. 137, 177 (1803). As this Court reiterated more than 150 years later, Marbury v. Madison "declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system." Cooper v. Aaron, 358 U.S. 1, 18 (1958).

This Court's supremacy in matters of constitutional interpretation is complete, even as against the actions of the other two branches of government. In enacting RFRA, Congress sought to reject the Court's interpretation of the First Amendment, and in so doing, exceeded its own constitutional authority. Contests between the three branches of government, while rare, are not unknown. However, even these contests are to be resolved by the Court, since the boundaries of each branch's power and authority are contained in the Constitution. "Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional

interpretation, and is the responsibility of this Court, as ultimate interpreter of the Constitution." Baker v. Carr, 369 U.S. 186, 211 (1962). In case of a conflict between the interpretation given the federal constitution by the legislature, and that given it by the Supreme Court, a long line of constitutional jurisprudence unequivocally states that the interpretation of the Supreme Court prevails. United States v. Nixon, 418 U.S. 683, 703-704 (1974) (citations omitted).

RFRA presents a classic example of this sort of disagreement among the branches of government. Pursuant to the doctrine of separation of powers, this Court, and not Congress, is the final arbiter of the meaning of the federal constitution and its amendments. Nor can RFRA's rejection of Employment Division v. Smith and purported "restoration" of Sherbert/Yoder be saved by characterizing it as a restoration of constitutional protection, as Petitioner has done. "The establishment or reduction of constitutional rights cannot be accomplished either by congressional action or executive fiat. This is perhaps the most fundamental concept of constitutional supremacy." Clark v. Board of Ed. of Little Rock School Dist., 374 F.2d 569, 570 (8th Cir. 1967).[20]

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[20] See also In re Brichard Securities Litigation, 788 F. Supp. 1098 at 1102-03, 1112 (N.D. Cal. 1992) ([I]t is quite clear that Congress cannot subject the judgments of the Supreme Court to the reexamination and revision of any other department of government.

For precisely these reasons, courts have already begun to question the constitutionality of RFRA. In a recent federal court decision, a church seeking an exemption from a city zoning ordinance invoked RFRA, arguing that the city could not show a compelling interest to justify its zoning ordinance, and that the ordinance was therefore unconstitutional. The court stated that "[t]he church's argument is flawed, however, to the degree it relies on the RFRA as proof positive of the ordinance's constitutionality; Congress's codification of certain Supreme Court opinions is not dispositive of the constitutional parameters of the free exercise of religion." Celestial Church of Christ, Inc. v. City of Chicago, 1994 W.L. 282, 304 (N.D. Ill. June 22, 1994).

Similarly, in dicta, the Seventh Circuit questioned Congress's power to reverse the Smith decision, stating that the constitutionality of RFRA "raises a number of questions involving the extent of Congress's powers under Section 5 of the 14th Amendment." Canedy v. Boardman, 16 F.3rd 183, 186 n.2 (7th Cir. 1994).

Respondents contend, as they did on rehearing before the Alaska Supreme Court, that RFRA is violative of the doctrine of separation of powers and therefore unconstitutional. Congress simply may not instruct this

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. . . Congress may not enact a law that contravenes the Supreme Court's judgment on questions of constitutional interpretation) (citations omitted).

Court as to the proper interpretation of the federal constitution. Employment Division v. Smith, and not the Religious Freedom Restoration Act, governs Petitioner's claim to an exemption under the free exercise clause of the First Amendment to the U.S. Constitution.

IV. IT IS NEITHER NECESSARY NOR APPROPRIATE FOR THE COURT TO REEXAMINE AND OVERRULE EMPLOYMENT DIVISION V. SMITH

Petitioner urges the Court to grant his petition in order to revisit and overrule Employment Division v. Smith, 494 U.S. 872 (1990). See Petition at 24-27. Smith should be overruled, according to Petitioner, because it has been criticized by some legal scholars and because Congress expressed disapproval of its holding in enacting RFRA.

This Court should decline Petitioner's invitation for two reasons. First, the Court has already reaffirmed its Smith analysis in Church of the Lukumi Babalu Aye v. City of Hialeah, 113 S. Ct. 2217 (1993). That case presented the Court with an opportunity to reexamine and overrule Smith had it wished to do so. Instead, the Court precisely followed Smith in analyzing the Petitioners' free exercise claims. It is thus unnecessary for the Court to again state that the test set forth in Smith remains the law of the land.

Second, and more importantly, the rule of *stare decisis* requires respect for, and adherence to, prior

judicial rulings except in extremely rare instances. Petitioner has not shown that this is such an instance.

In Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992) this Court had occasion to apply the rule of *stare decisis* in connection with its reexamination and reaffirmation of Roe v. Wade, 410 U.S. 113 (1973). While noting that the Roe decision has "engendered opposition", the Court stated that "the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable." Planned Parenthood v. Casey, 112 S. Ct. at 2808.

The Court then outlined a four-part analysis for determining whether to overrule a prior case: Whether the rule of the prior case has been found to be "unworkable"; whether the rule has been relied upon so as to cause a special hardship if it were overruled; whether the law has developed so far since the enactment of the rule that it is "no more than a remnant of abandoned doctrine"; and whether facts have so far changed "as to have robbed the old rule of significant application". Planned Parenthood, 112 S. Ct. at 2808-2809.

Application of this standard to Employment Division v. Smith clearly reveals that the constitutional analysis set forth in that decision remains viable. An examination of cases decided since Smith demonstrates

that the Smith analysis is workable and straightforward[21]. Overruling Smith merely because its holding has engendered controversy "would seriously weaken the Court's capacity to exercise the judicial power and to function as the Supreme Court of a Nation dedicated to the rule of law." Planned Parenthood, 112 S. Ct. at 2814.

CONCLUSION

For the reasons set forth herein, Respondents believe this is not an appropriate case for the exercise of this Court's discretionary jurisdiction. Respondents therefore request that the Court deny the Petition for Writ of Certiorari.

DATED this 23rd day of August, 1994.

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[21] See Kissinger v. Board of Trustees, 5 F.3d 177 (6th Cir. 1993) (university not required to alter its veterinary medicine curriculum, which was generally applicable to all students, to accommodate student who objected to one course for religious reasons); American Friends Service Comm. v. Thornburgh, 961 F.2d 1405 (9th Cir. 1991) (applying generally applicable employer sanctions under Immigration Reform and Control Act does not violate religious organization's free exercise rights); Ryan v. U.S. Dept. of Justice, 950 F.2d 458 (7th Cir. 1991) (FBI agent discharged for violating neutral and general rules of conduct not entitled to exemption based on religious views).

(3)

Supreme Court, U.S.
FILED
SEP 7 1994
OFFICE OF THE CLERK

No. 94-169

In The

Supreme Court of the United States

October Term, 1994

TOM SWANNER, d/b/a WHITEHALL PROPERTIES,

Petitioner,

v.

ANCHORAGE EQUAL RIGHTS COMMISSION, PAUL L. CONNERTY, EXECUTIVE DIRECTOR, ex rel. JOSEPH BOWLES, WILLIAM F. HARPER, and DEE MOOSE,

Respondents.

Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Alaska

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

I. THE ALASKA COURT'S DECISION DOES NOT REST UPON ADEQUATE STATE GROUNDS SUFFICIENT TO SUSTAIN THE JUDGMENT INDEPENDENT OF FEDERAL LAW

The Alaska Supreme Court's decision is not based upon independent and adequate state grounds because in reaching its judgment the lower court rejected Swanner's state constitutional arguments and decided that there is a compelling government interest which overrides Swanner's right to the free exercise of religion under the Religious Freedom Restoration Act of 1993 ("RFRA").[1] Because the Alaska Court rejected Swanner's state constitutional arguments, under the Supremacy Clause[2] the federal questions regarding the First Amendment and RFRA are an essential and mandatory portion of the Alaska Court's decision which predominate its judgment. Because the federal questions predominate, the Alaska Court's judgment will not stand if this Court reverses on the federal questions. The Alaska Court cannot obviate this Court's review of Swanner's federal Constitutional and statutory rights simply by denying Swanner relief under state law.

The independent and adequate state ground doctrine only applies "[w]hen the outcome of a state court case could *not* be changed, even if the federal law issue were resolved differently by the United States Supreme Court. . . ." Justice O'Connor, *Our Judicial Federalism*, 35 Case W. Res. L. Rev. 1, 5 (1984) (emphasis in original).[3] Because the federal questions in this case predominate, it is of no consequence that the Alaska Court reviewed and

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[1] 42 U.S.C. §§ 2000bb *et seq.*

[2] U.S. Constitution Article VI.

[3] *See also Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 566 (1977); *Herb v. Pitcairn*, 324 U.S. 117, 125-126 (1945).

rejected Swanner's arguments regarding the Alaska Constitution.

Principally, it is because the Alaska Court upheld the local governments' actions under state law that this Court has power to review the federal questions presented. "If . . . a state court upholds a particular state action on the ground that it offends *neither* federal nor state law, then the Supreme Court has power to review the state court judgment – though on the federal question only. Thus, a state court's rejection of both the federal and state due process challenges may be reviewed by the Supreme Court. The decision on the federal grounds in these circumstances could change the result in the case, since the Supreme Court's disagreement with the state court on the federal question would render the challenged state action unlawful." Justice O'Connor, 35 Case W. Res. L. Rev. at 6 *citing Ohio v. Johnson*, 467 U.S. 493, 497 n. 7 (1984) (emphasis in original).

It is axiomatic that the Alaska Court's incorporation of the federal *Sherbert/Yoder* compelling interest test into Alaska's state constitutional law does not defeat this Court's application of the controlling federal standard. Again, the simple explanation is that the federal questions predominate and, in the words of Justice O'Connor, "the Supreme Court's disagreement with the state court on the federal question would render the challenged state action unlawful." 35 Case W. Res. L. Rev. at 6.

Moreover, because the Alaska Court incorporated the *Sherbert/Yoder* compelling interest test into Alaska's constitutional law, the Alaska Court's judgment is not *independent* of federal law. *See Zacchini*, 433 U.S. at 568;[4] *accord* Justice O'Connor, 35 Case W. Res. L. Rev. at 6.

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[4] In *Zacchini*, where the Ohio Supreme Court applied United States Supreme Court First Amendment precedents arguably as incorporated into Ohio's substantive state law, this Court held that "[e]ven if the judgment in favor of respondent must nevertheless be understood as ultimately resting on Ohio law, it appears that at the very least the Ohio court felt compelled by what it understood to be federal constitutional considerations to construe and apply its own law in the manner it did. In this event, we have jurisdiction and should decide the federal issue; for if the state court erred in its understanding of our cases and of the First and Fourteenth Amendments, we should so declare, leaving the state court free to decide the privilege issue solely as a matter of Ohio law." 433 U.S. at 568 *citing* and *quoting Perkins v. Benquet Cons. Min. Co.*, 342 U.S. 437, 441-43 (1952); *Missouri ex rel. Southern R. Co. v. Mayfield*, 340 U.S. 1, 5 (1950).

Finally, respondents' observation that the Alaska constitution affords greater protection to religious liberty than this Court's *Employment Division v. Smith*[5] decision is meaningless because it ignores both RFRA and the Supremacy Clause. RFRA moots *Smith* by creating a federal statutory protection for the free exercise of religion codifying the *Sherbert/Yoder* compelling interest test.[6] This Court's application of RFRA's compelling interest test has supremacy over the Alaska Court's decision. This Court's authority to apply or reexamine *Smith's* federal Constitutional interpretation also has supremacy over the Alaska Court's decision.

II. THERE IS SIGNIFICANT CONFLICT, DIRECT AND IN PRINCIPLE, BETWEEN THE ALASKA COURT'S DECISION AND THE DECISIONS OF COURTS FROM OTHER STATES SUFFICIENT TO WARRANT REVIEW BY THIS COURT

Each of the state courts which have analyzed the question of whether a private landlord can be compelled to rent to unmarried cohabitors despite her strong religious convictions against cohabitation and its facilitation, have done so through application of the *Sherbert/Yoder* compelling interest test. *See Swanner* (Petition App. 14,

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[5] 494 U.S. 872 (1990).

[6] 42 U.S.C. §§ 2000bb(a); 2000bb-1(a); 2000bb-1(b).

18-21, 29-30 and n. 9); *Attorney General v. Desilets*, 636 N.E.2d 233, 236 (Mass. 1994);[7] *Minnesota v. French*, 460 N.W.2d 2, 9-10 (Minn. 1990);[8] *Smith v. Commission of Fair Empl. & Hous.*, 25 Cal. App. 4th 251, 30 Cal. Rptr. 2d 395, 402-05, *mod. reh'g den.*, 1994 Cal. App. LEXIS 649 (Cal. App. 1994).[9]

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[7] The Massachusetts Supreme Court ruled "we prefer to adhere to the standards of earlier First Amendment jurisprudence . . . we used the balancing test that the Supreme Court had established under the free exercise of religion clause in *Wisconsin v. Yoder*, 406 U.S. 205, 215-229, 32 L. Ed. 2d 15, 92 S. Ct. 1526 (1972); *Sherbert v. Verner*, 371 U.S. 398, 406-409, 9 L. Ed. 2d 273, 83 S. Ct. 321 (1963); and subsequent opinions." *Desilets*, 636 N.E. 2d at 236. Respondents' point that the Massachusetts Constitution contains an extra and unique religion provision is meaningless. In *Desilets*, the Massachusetts Court expressly declined to analyze that extra and unique Constitutional provision. *Id.* at 242.

[8] The Minnesota Supreme Court ruled "we are compelled to conclude that French must be granted an exemption from the MHRA unless the state can demonstrate (sic) compelling and overriding state interest . . . the state has the duty to enforce a statute in the least restrictive way to accommodate religious belief. . . . " *French*, 460 N.W.2d at 9-10. Minnesota has adopted the *Sherbert/Yoder* compelling interest test as part of its state constitutional law. *See Minnesota v. Hershberger*, 462 N.W.2d 393, 396-99 (Minn. 1990).

[9] In *Smith v. Comm'n* the California Court of Appeals applied the *Sherbert/Yoder* compelling interest test as mandated by *Employment Division v. Smith*. 30 Cal. Rptr. 2d at 402-05. Under *Employment Division v. Smith* the California Court applied the compelling interest test because it found that there were hybrid Constitutional rights at issue (speech and religion). *Id.* Respondents' claim that *Smith v. Comm'n* is distinguishable from *Swanner* because the California case involved "hybrid" rights while the Alaska case did not is incorrect. Both *Smith v. Comm'n* and *Swanner* involved First Amendment speech because the landlords in both cases were ordered to post and distribute notices declaring that their religiously based conduct

Because the Alaska Court's interpretation and application of the *Sherbert/Yoder* compelling interest test is directly contrary to the Massachusetts, Minnesota and California Courts' interpretation and application of that test in identical factual circumstances, there is a conflict *in principle* among the states which should be resolved by this Court. Sup. Ct. R. 10.1(b).[10] The California Court of Appeals decision in *Smith v. Comm'n* actually presents a direct conflict with the Alaska Court's decision in *Swanner*.[11]

Moreover, the conflict *in principle* is amplified by the fact that under RFRA the *Sherbert/Yoder* compelling interest test is, once again, controlling federal law. It requires little foresight to conclude that, when given the opportunity to analyze RFRA in this factual setting, each of the Massachusetts, Minnesota and California Courts will reach exactly the opposite conclusion than that reached

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is illegal. *Compare* Petition App. 112-13 to 30 Cal. Rptr. 2d at 402-05.

[10] The conflict *in principle* presented by this case, which is substantial and intolerable because it relates to the fundamental right to free exercise of religion, warrants this Court's review. *See Ivan Allen Co. v. United States*, 422 U.S. 617, 623-24 (1975) (certiorari granted on claimed "conflict in principle" with a district court opinion which had been summarily affirmed by the court of appeals); *Saxbe v. Washington Post Co.*, 417 U.S. 843, 846 (1974) ("an apparent conflict in approach"); *United States v. National Bank of Commerce*, 472 U.S. 713, 719 (1985) ("appeared to us to conflict, directly or in principle, with decisions of other Courts of Appeals"); *Oregon Dept. of Fish & Wildlife v. Klamath Tribe*, 473 U.S. 753, 764 (1985) ("appeared to conflict in principle").

[11] Both the *Smith v. Comm'n* and *Swanner* opinions address the controlling *federal* compelling interest test. It is of no consequence that the California Court applied the test in *Smith v. Comm'n* based upon an *Employment Division v. Smith* "hybrid right" analysis while the Alaska Court applied the test under RFRA. By either analysis the test is the same, and the two courts' conclusions are opposite and directly conflicting.

by the Alaska Court. The interpretation and application of the compelling government interest test under RFRA presents an important federal question which has not been, but which should be, reviewed by this Court. Sup. Ct. R. 10.1(c).

III. CONGRESS PROPERLY ENACTED RFRA PURSUANT TO ITS LEGISLATIVE POWER UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT[12]

Respondents' challenge to RFRA's constitutionality is both misconceived and incorrect. Respondents' challenge is misconceived because Swanner does not argue that RFRA "overrules" *Smith;* Congress did not intend RFRA to "overrule" *Smith;* and RFRA does not purport to "overrule" *Smith.* Respondents' challenge is incorrect because Congress has the power to enact RFRA.

A. Respondents' Challenge To RFRA's "Overruling" Of Smith Is Misconceived. Swanner does not argue that RFRA "overrules" *Smith.* (*Petition* at 8, 10, 14-16, 27). More significantly, Congress did not enact RFRA as an intended "overruling" of *Smith.* The Senate Judiciary Committee Report describes RFRA as a *response* to *Smith* which creates a *statutory,* rather than Constitutional, protection for the free exercise or religion.[13] Contrary to respondents' suggestion, RFRA does not interpret the Constitution and does not purport to create Constitutional law. Rather, RFRA creates statutory law which provides a higher level of protection for the free exercise

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[12] Respondents' arguments regarding RFRA's constitutionality should not be considered by this Court because they were not pressed or passed upon below. *See Illinois v. Gates,* 462 U.S. 213, 221-24 (1983); *accord Cohen v. Cowles Media Co.,* 501 U.S. 663, ___, 111 S. Ct. 2513, 2517 (1991).

[13] Senate Report (Jud. Comm.) No. 103-111 *reprinted in* 1993 U.S. Code, Cong. & Ad. News 1892, 1893, 1904.

of religion than is afforded by the Free Exercise Clause of the First Amendment pursuant to this Court's controlling Constitutional interpretation in *Smith.*[14]

B. Respondents' Challenge To Congress' Power To Enact RFRA Is Incorrect. Congress can exercise its Fourteenth Amendment enforcement power to statutorily expand the measure of protection afforded the fundamental liberties embodied within the Fourteenth Amendment to levels beyond that previously afforded by this Court's Constitutional interpretation. Section 5 of the Fourteenth Amendment authorizes Congress "to enforce, by appropriate legislation, the provisions" of the Amendment. Section 5 gives Congress "the same broad powers expressed in the necessary and proper clause" with respect to state governments and their subdivisions. *Katzenbach v. Morgan,* 384 U.S. 641, 650 (1966). " 'Whatever legislation is appropriate, that is, adapted to carry out the objects the Amendments have in view,' " is within the power of Congress, unless prohibited by some other provision of the Constitution. *Id. quoting Ex Parte Virginia,* 100 U.S. 339, 345 (1879). The Fourteenth Amendments's "fundamental concept of liberty . . . encompasses the liberties guaranteed by the First Amendment," which of course include the right to practice one's faith free of laws prohibiting the free exercise of religion. *Cantwell v. Connecticut,* 310 U.S. 296, 303 (1940).

This principle is best exemplified by *Katzenbach.* In *Katzenbach* this Court upheld section 4(e) of the Voting Rights Act of 1965, enacted under Section 5 of the Fourteenth Amendment, which prohibits state English literacy requirements for voters. This Court upheld Congress' enactment of section 4(e) of the Voting Rights Act even though the Court had earlier rejected a Fourteenth

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[14] Irrespective of RFRA, *Smith* remains controlling law regarding the Free Exercise Clause of the First Amendment. *Smith* is moot, however, because RFRA provides more protection for free exercise than does the First Amendment.

Amendment Equal Protection challenge to state literacy requirements for voters. *Katzenbach,* 384 U.S. at 648-49 *citing Lassiter v. Northampton County Bd. of Election,* 360 U.S. 45 (1959).

Likewise, in *Oregon v. Mitchell,* 400 U.S. 112, 118-19 (1970), a unanimous Court agreed that Congress could impose a nationwide ban on literacy tests for voters despite the Court's earlier decision in *Lassiter* that such tests did not violate the Equal Protection Clause. Later, in *Fullilove v. Klutznick,* 448 U.S. 448, 476-78 (1980), this Court upheld Congress' use of its Fourteenth Amendment enforcement power to establish affirmative action quotas for minority business participation in public construction projects, even though the Court had earlier held that the Fourteenth Amendment prohibits only purposeful discrimination.[15]

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[15] This Court's past opinions are replete with examples of the Court's affirmance of Congress' power to enact statutory protections for Constitutionally protected rights at levels higher than that afforded by the Court's prior Constitutional interpretations. For example, in *Metro Broadcasting, Inc. v. F.C.C.,* 497 U.S. 547, 565-66 (1990) this Court approved the FCC's minority ownership programs, which were specifically mandated by Congress, despite the Court's earlier decision in *Richmond v. J.A. Croson Co.,* 488 U.S. 469, 490 (1989) disapproving on Equal Protection grounds, a municipality minority set-aside program. In *E.E.O.C. v. Wyoming,* 460 U.S. 226, 243 (1983) Justice Brennan, joined by Justices Marshall, Blackmun, and Stevens upheld Congress' enactment of legislation, under the auspices of the Commerce Clause, making age discrimination unlawful despite the Court's earlier ruling that age classifications are allowed under Equal Protection analysis if supported by a rational basis. *See Massachusetts Board of Retirement v. Murgia,* 427 U.S. 307, 313 (1976). In *Board of Education v. Mergens,* 496 U.S. 226, 247-53 (1990), this court upheld Congress' enactment of the Equal Access Act (hereafter "EAA" 20 U.S.C. §§ 4071 *et seq.*) under Section 5 of the Fourteenth Amendment. The EAA was designed to expand this Court's prior interpretation of free speech and

Congress properly enacted RFRA pursuant to its Constitutional power granted by Section 5 of the Fourteenth Amendment to ensure protection of the fundamental concepts of liberty (*i.e.,* the free exercise of religion) which are embodied within the Fourteenth Amendment.[16]

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free exercise rights under the First Amendment in relationship to the Establishment Clause as defined by this Court in *Widmar v. Vincent,* 454 U.S. 263, 271-75 (1981). Also, the Americans with Disabilities Act of 1990 provides greater protection to disabled persons than does the Equal Protection Clause of the Fourteenth Amendment. *Compare* 42 U.S.C. §§ 12101 *et seq.* (which defines and prohibits discrimination against disabled individuals) with *City of Cleburne v. Cleburne Living Center,* 473 U.S. 532, 440-446 (1985) (which holds that classifications based upon mental handicap are allowed if they are rationally related to a legitimate governmental purpose). As another example, Title VII provides a higher level of protection against gender discrimination than does the Equal Protection Clause of the Fourteenth Amendment. *Compare* 42 U.S.C. § 2000e-2 (which defines sex discrimination and makes it unlawful) with *Wengler v. Druggists Mut. Ins. Co.,* 446 U.S. 142, 150 (1980); and *Mississippi University for Women v. Hogan,* 458 U.S. 718, 724 (1982) (which rule that under the Equal Protection Clause gender classifications are allowed if they are substantially related to a sufficiently important governmental interest).

[16] Respondents reliance upon *Marbury v. Madison,* 5 U.S. 137, 177 (1803) is misplaced. *See* L. Tribe, *American Constitutional Law,* § 5-14, p. 349 (2d ed. 1988) ("Judicial review does not require that the Constitution always be equated with the Supreme Court's view of it. It is the Court's responsibility, under *Marbury,* to strike down acts of Congress which the Court concludes to be unconstitutional – nothing more. *Marbury* implies nothing about the criteria by which the Court should determine whether an act of Congress is constitutional; it requires only that such criteria should exist. Criteria which invalidate all legislation founded on interpretations of the Fourteenth Amendment different from those of the Supreme Court, therefore, are no more consistent with *Marbury* than criteria which allow Congress to adopt any plausible interpretation of

Respondents' assertion that RFRA represents an improper use of Congress' legislative power is meritless.

CONCLUSION

For the reasons stated, the Court should grant the petition for a writ of certiorari to the Supreme Court of the State of Alaska.

Respectfully submitted,

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Dated: September 7, 1994

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the fourteenth amendment; since both sets of criteria fix limits on congressional power, albeit of differing degrees of severity, both do justice to *Marbury*, and neither jeopardizes the principle of judicial review").

SUPREME COURT OF THE UNITED STATES

TOM SWANNER, DBA WHITEHALL PROPERTIES *v.*
ANCHORAGE EQUAL RIGHTS COMMISSION ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALASKA

No. 94–169. Decided October 31, 1994

The petition for a writ of certiorari is denied.

JUSTICE THOMAS, dissenting.

Petitioner owns residential rental property in Anchorage, Alaska. He maintained a consistent policy of refusing to rent to any unmarried couple who intended to live together on his property, based on his sincere religious belief that such cohabitation is a sin and that he would be facilitating the sin by renting to cohabitants. At the instigation of several people to whom petitioner applied his policy, respondent ruled that petitioner had violated state and local ordinances that prohibit landlords from basing rental decisions on prospective tenants' "marital status." Petitioner appealed to the Alaska Superior Court, which upheld respondent's ruling. The Alaska Supreme Court affirmed, concluding that the application of the ordinances to petitioner's conduct did not violate his right to the free exercise of religion under either the United States Constitution or the Alaska Constitution. 874 P. 2d 274, 279–284 (1994) *(per curiam)*.

The Alaska Supreme Court also ruled that petitioner had no defense to the state and local ordinances under the Religious Freedom Restoration Act of 1993 (RFRA), 107 Stat. 1488, 42 U. S. C. §2000bb *et seq.* (1988 ed., Supp. V), enacted during the pendency of the proceedings below. RFRA provides that a governmental entity "shall not substantially burden a person's exercise of religion even if the burden results from a rule of general

applicability," unless the entity "demonstrates that application of the burden to the person . . . is in furtherance of a compelling governmental interest." §2000bb–1(a), (b)(1).[1] In a footnote, the opinion below dismissed petitioner's invocation of this Act of Congress: "Assuming that the Act is constitutional and applies to this case, it does not affect the outcome, because we hold in the next section that compelling state interests support the prohibitions on marital status discrimination." 874 P. 2d, at 280, n. 9. Petitioner seeks review of this latter ruling. I would grant certiorari to resolve whether, under RFRA, an interest in preventing discrimination based on marital status is sufficiently "compelling" that respondent may substantially burden petitioner's exercise of religion.

RFRA explicitly adopted "the compelling interest test as set forth in Sherbert v. Verner . . . and Wisconsin v. Yoder." 42 U. S. C. §2000bb(b)(1) (1988 ed., Supp. V). In *Sherbert* v. *Verner,* 374 U. S. 398 (1963), we stated: "It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, 'only the gravest abuses [by religious adherents], endangering paramount interests, give occasion for permissible limitation [on the exercise of religion].'" *Id.*, at 406 (quoting *Thomas* v. *Collins,* 323 U. S. 516, 530 (1945)). And in *Wisconsin* v. *Yoder,* 406 U. S. 205 (1972), we emphasized that the government's asserted interest must be truly paramount: "The essence of all that has been said and written on the subject is that only those interests *of*

[1] RFRA was Congress' response to our decision in *Employment Div., Dept. of Human Resources of Ore.* v. *Smith,* 494 U. S. 872 (1990), which supplanted the compelling interest test in Free Exercise Clause jurisprudence with the inquiry into whether a governmental burden on religiously motivated action is both "neutral" and "generally applicable." Thus, as a substitute for constitutional protection, RFRA grants a *statutory* "claim or defense to persons whose religious exercise is substantially burdened by government." 42 U. S. C. §2000bb(b)(2) (1988 ed., Supp. V).

the highest order . . . can overbalance legitimate claims to the free exercise of religion." *Id.*, at 215 (emphasis added).

I am quite skeptical that Alaska's asserted interest in preventing discrimination on the basis of marital status is "compelling" enough to satisfy these stringent standards. Our decision in *Bob Jones University* v. *United States,* 461 U. S. 574 (1983), is instructive in the context of asserted governmental interests in preventing private "discrimination." In that case, we held that "the Government has a fundamental, overriding interest in eradicating racial discrimination in education." *Id.*, at 604. We found such an interest fundamental and overriding—in a word, "compelling," see *ibid.*—only because we had found that "[o]ver the past quarter of a century, every pronouncement of this Court and myriad Acts of Congress and Executive Orders attest a firm national policy to prohibit racial segregation and discrimination in public education." *Id.*, at 593 (discussing, *inter alia, Brown* v. *Board of Education,* 347 U. S. 483 (1954); *Cooper* v. *Aaron,* 358 U. S. 1 (1958); and Title VIII of the Civil Rights Act of 1968 (Fair Housing Act), 42 U. S. C. §3601 *et seq.* (1976 ed. and Supp. V)).

By contrast, there is surely no "firm national policy" against marital status discrimination in housing decisions. Chief Justice Moore, dissenting in the case below, correctly observed that "marital status classifications have never been accorded any heightened scrutiny under the Equal Protection Clause of either the federal or the Alaska Constitutions." 874 P. 2d, at 289. Accord, *Smith* v. *Shalala,* 5 F. 3d 235, 239 (CA7 1993) ("Because [a] classification based on marital status does not involve a suspect class . . . , we must examine it under the rational basis test"), cert. denied, 510 U. S. ___ (1994). Moreover, the federal Fair Housing Act does not prohibit people from making housing decisions based on marital status. See 42 U. S. C. §3604 (outlawing housing discrimination on the basis of race, color, religion, sex, handicap, familial status, or national origin). Cf.

§3602(k) (defining "familial status" to mean the domicile of children with adults).

Nor does Alaska law, apart from the statutes at issue in this case, attest to any firm *state* policy against marital status discrimination. Indeed, as the dissent below pointed out:

> "Alaska law explicitly sanctions such discrimination. *See, e.g.*, AS 13.11.015 (intestate succession does not benefit unmarried partner of decedent); AS 23.30.215(a) (workers' compensation death benefits only for surviving spouse, child, parent, grandchild, or sibling); Alaska R. Evid. 505 (no marital communication privilege between unmarried couples); *Serradell* v. *Hartford Accident & Indemn. Co.*, 843 P. 2d 639, 641 (Alaska 1992) (no insurance coverage for unmarried partner under family accident insurance policy)." 874 P. 2d, at 289.

The majority admitted that these were "areas in which the state itself discriminates based on marital status." *Id.*, at 283.

If, despite affirmative discrimination by Alaska on the basis of marital status and a complete absence of any national policy against such discrimination, the State's asserted interest in this case is allowed to qualify as a "compelling" interest—that is, a "paramount" interest, an interest "of the highest order"—then I am at a loss to know what asserted governmental interests are not compelling. The decision of the Alaska Supreme Court drains the word *compelling* of any meaning and seriously undermines the protection for exercise of religion that Congress so emphatically mandated in RFRA.

Although RFRA itself is a relatively new statute, the state courts have already exhibited considerable confusion in applying the *Sherbert-Yoder* test to the specific issue presented by this case. Apart from this case, the highest courts of Massachusetts and Minnesota are each deeply split on the question whether preventing "marital status" discrimination is a "compelling" interest under

our precedents, and the California Court of Appeal has twice applied the compelling interest test adopted by RFRA in reaching decisions that are directly contrary to the decision below. See *Attorney General* v. *Desilets*, 418 Mass. 316, 636 N. E. 2d 233 (1994); *State ex rel. Cooper* v. *French*, 460 N. W. 2d 2 (Minn. 1990); *Smith* v. *Fair Employment and Housing Commission*, 30 Cal. Rptr. 2d 395 (Cal. App.), review granted, ___ P. 2d ___ (Cal. 1994); *Donahue* v. *Fair Employment and Housing Commission*, 2 Cal. Rptr. 2d 32 (Cal. App. 1991), review granted, 825 P. 2d 766 (Cal. 1992), review dism'd, cause remanded, 859 P. 2d 671 (Cal. 1993).[2] By itself, this confusion on an important and recurring question of federal law provides sufficient reason to grant certiorari in this case.

I respectfully dissent.

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[2]There is no doubt that these decisions applied the *Sherbert-Yoder* test adopted by RFRA. *See Desilets*, 418 Mass., at 321–322, and n. 5, 636 N. E. 2d, at 236, and n. 5 (plurality opinion); *id.*, at 334–335, 636 N. E. 2d, at 243 (Liacos, C. J., concurring); *id.*, at 341, 636 N. E. 2d, at 246 (O'Connor, J., dissenting); *French*, 460 N. W. 2d, at 13–14 (Popovich, C. J., dissenting); *Smith*, 30 Cal. Rptr. 2d, at 403, 406, 409, 410; *Donahue*, 2 Cal. Rptr. 2d, at 41, 44.